187

No. (1)

Supreme Court, U.S.
FILED
101387 MAR 10 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DONNY DOUGLAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the decision of the Sixth Circuit upholding petitioner's conviction under 18 U.S.C. § 1951 is in conflict with *United States v. Enmons*, 410 U.S. 396 (1973), which significantly limits the application of the Hobbs Act in the context of collective bargaining activities.

2.

Whether the decision of the Sixth Circuit upholding petitioner's conviction for conspiring to violate 29 U.S.C. § 186, and allowing the conviction of a labor organization representative absent any proof that their conduct contemplated their *own* receipt, either directly or indirectly, of any "thing" of financial or pecuniary "value," is in conflict with the plain meaning of the statute and with the decision of the Second Circuit in *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990), creating a circuit split which this Court should resolve.

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the Sixth Circuit as to which *certiorari* is sought is reported as *United States v. Douglas*, 634 F.3d 852 (6th Cir. 2011). The previous decision of the Sixth Circuit is reported as *United States v. Douglas*, 398 F.3d 407 (6th Cir. 2005). The Opinion and Order of the trial judge denying post-trial motions is unpublished, but is available as *United States v. Campbell*, 2006 WL 3694618 (E.D. Mich. 2006). The Opinion of the trial court denying a post-remand motion to dismiss is unpublished, but is available as *United States v. Campbell*, 2006 WL 897436 (E.D. Mich. 2006). The trial court's opinion granting a motion to dismiss, which was reversed in the first Court of Appeals opinion, is reported as *United States v. Campbell*, 291 F. Supp. 2d 547 (E.D. Mich. 2003).

BASIS OF JURISDICTION IN THIS COURT

The Opinion of the Court of Appeals was filed on February 10, 2011. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The indictment upon which petitioner was tried stated offenses against the United States, defined in Titles 18 and 29, United States Code. The trial court had subject matter jurisdiction over the proceedings under 18 U.S.C. § 3231. A Timely Notice of Appeal from the Judgment of Conviction and Sentence entered by the

trial court was filed, and the Court of Appeals was thereby vested with appellate jurisdiction under the provisions of 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1951:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or

violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

29 U.S.C. § 186:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section

13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

STATEMENT OF THE CASE

In 2002, a Grand Jury sitting in the Eastern District of Michigan returned a three-count Indictment against Donny Douglas, Jay Campbell, and William J. Coffey, alleging in Count I a conspiracy to violate various provisions of § 302 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186, under the "offense clause" of 18 U.S.C. § 371, as well as, in Count II, Conspiracy to Commit Extortion under the Hobbs Act, 18 U.S.C. § 1951, and, in Count III, Mail Fraud, contrary to 18 U.S.C. § 1341. The charges grew out of the defendants' work as representatives of the United Auto Workers ("UAW") and their dealings, in collective bargaining efforts, with representatives of the General Motors Corporation ("GM").

Mr. Coffey died in June, 2003, and the charges against him were accordingly dismissed. In October of 2003, the trial Judge, the Hon. Nancy G. Edmunds,

granted a defense motion to dismiss the Indictment for failure to charge an offense. App. 79. The government appealed, and the Sixth Circuit reversed. *United States v. Douglas*, 398 F.3d 407 (6th Cir. 2005). App. 23.

After the trial judge denied renewed motions to dismiss, App. 62, the matter proceeded to trial beginning June 1, 2006, before Judge Edmunds and a jury, and on June 27, Messrs. Douglas and Campbell were found guilty of the charges contained in Counts One and Two.[1] The trial judge denied post-trial motions for judgment of acquittal, for a new trial, and in arrest of judgment in a combined Opinion and Order entered December 13, 2006. App. 51.

Mr. Douglas filed a timely Notice of Appeal on June 4, 2007, and the Sixth Circuit affirmed his convictions in a published opinion, *United States v. Douglas*, 634 F.3d 852 (6th Cir. 2011). App. 1.

At the center of the events which led to the charges in this case is GM's Pontiac facility. This is a sprawling, multifaceted complex which, during the relevant time period, included four operations: the Truck Production Center (TPC), a mockup facility, a facility known as TPC West, and the TPC Validation Center. TPC West and the Validation Center produced prototype vehicles. At TPC West workers "stall

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[1] Following the close of the government's proofs, Judge Edmunds granted a Motion for Judgment of Acquittal as to Count Three on the basis of the insufficiency of the evidence of mailing.

build" vehicles, *i.e.*, build a car in one place, while the Validation Center is set up like a plant, to test, or "validate" the parts and the process of building the vehicle as a prelude to mass production.

The plants employed both skilled and unskilled hourly employees, with "skilled trades" positions far more highly paid. All of the hourly employees were represented by Local 594 of the UAW.

At the times in question, Jay Campbell was the Shop Committee Chairman of Local 594, and petitioner Donny Douglas, a former President of Local 594, served as a UAW International Servicing Representative, while William Coffey was the skilled trades "zone man" for Local 594 – the local union official whose "zone of responsibility" was the skilled trades employees.

General Motors and the UAW periodically negotiate national agreements, which cover all North American plants, and local facilities negotiate local agreements, which may not contradict the national agreement, but typically address a myriad of local concerns, including such things as pending grievances.

In the 1993 local agreement, GM had agreed to bring mockup work back into the local facility from facilities outside of the plant complex (prior to this agreement, mockup work was done at various locations, including non-GM job shops), but the parties did not reach an agreement regarding how the mockup facility would be staffed.

In the course of a series of meetings in 1995, when GM was getting ready to staff the mockup facility, the GM representative testified, William Coffey took the position that if GM wanted to reach an agreement with Local 594 on how they would staff the mockup facility, GM would first have to agree to hire Gordon Campbell, Todd Fante, and Mike Freer, who were relatives of union officials, or former officials. The GM representative testified that he told Coffey that he believed that it would be a violation of "Section 302" [of the LMRA, codified as 29 U.S.C. § 186] to make this kind of demand, but Mr. Coffey persisted. Mr. Coffey insisted that the demand was not a "302 violation," and proclaimed that he was contemplating filing a lawsuit about the matter.

As other testimony made clear, however, this demand did not arise in a vacuum. For example, as early as 1993 Mr. Coffey had discussed the possibility of bringing in "new hires" to fill "gaps" in the staffing. And the GM representative involved in those discussions acknowledged that, while she did not recall that an agreement had been reached "populating" the mockup center, Mr. Coffey insisted that it had, and the defense introduced a Memorandum of Understanding regarding the mockup facility that addressed staffing considerations (including outside hires).

Ultimately, GM and Local 594 reached an agreement on the staffing of the mockup facility in December 1995, and Gordon Campbell, Fante, and Freer were not hired at that time; rather, GM staffed the facility with in-house personnel from TPC West.

According to testimony offered by the government, the matter of hiring the three men arose again when GM started to "ramp up" the Validation Center. The work that the Validation Center was to do had previously been done at a GM facility in Flint. As GM was moving that work from Flint to the Pontiac facility, GM wanted to bring the GM employees from Flint down to Pontiac to do the work. Paragraph 96 of the National Agreement between GM and the UAW covers the transfer of work from one plant to another and the flow of employees from one plant to another to go along with the transfer of work, and gives employees an opportunity to "follow your work."

During this process, Bill Coffey wrote a memorandum regarding the Union's position in regard to outstanding issues regarding the Validation Center. Among its provisions was a condition that "[t]he three individuals whose resumes were submitted to management, i.e., one metal model maker and two vehicle builders, will be hired prior to any additional new hires . . . in those classifications." Mr. Coffey gave the memorandum to the GM representative participating in the talks, who forwarded it to his superiors, complaining that the demand was "a blatant violation of Section 302." By this time, the GM representative testified that he believed that the men were simply unhireable through any process because "once Mr. Coffey approached me, and the method in which he approached me starting in August of 1995, that it poisoned the well, so to speak, and we would not be able to hire those employees."

Several days thereafter, on February 16, 1996, representatives of the UAW and GM met to discuss the Paragraph 96 move of work and personnel from Flint to Pontiac. According to one GM representative at the meeting Coffey said that Local 594 would not agree to the Paragraph 96 move unless GM agreed to hire Gordon Campbell, Todd Fante, and Mike Freer. Although witness accounts differed slightly, there was no question that the meeting grew extremely heated, with both Coffey and Jay Campbell hurling invectives. A GM representative testified that he heard Donny Douglas, who attended the meeting, say that "there would not be an agreement until those people were hired." They were not, however, hired at that time.

Late in 1996, negotiations over the local agreement began. The participating GM representative testified that she recalled Mr. Coffey becoming extremely emotional about the unresolved question of the three hires, complaining that he felt that they were being unfairly discriminated against.

When those negotiations foundered, a strike was called in April, 1997. The strike lasted 87 days, in the course of which negotiations resolved 452 demands and 3,756 grievances, and in the end GM made a commitment to hire 275 additional skilled trades men and women over three years.

Bill Coffey, Jay Campbell, and Donny Douglas all participated in various phases of the negotiations.

The matter of hiring Gordon Campbell or Todd Fante[2] did not come up in the daily discussions, because, according to the participating GM representative, "as a matter of strategy" it had been decided to leave it to higher level representatives – the lead negotiator for GM, and Don Douglas, on behalf of the Union. By June 30, 1997, the parties had signed off on a Skilled Trades Proposal, which included a provision for "two new hires."

The head of the GM team testified that significant issues remained to be resolved, but recalled that on July 15 or 16, he encountered Don Douglas, and they agreed that both sides were ready to come to terms. By July 18, a "tooth puller" – a document stating that the parties have resolved their differences – had been prepared and was ready for signature, when, he testified, the following occurred:

> I think I called Donny and said I had it ready or that we needed to get back at the main table to wrap things up. A few minutes later, there was a knock on the door. It was Donny, and I got up and I motioned for Gail, my associate, to come with me. At that point, Mr. Douglas said no, I just want to talk to you, and we went out in the hall, and at that point, he said I think we've got everything

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[2] By this time, Michael Freer had submitted an application directly to the company, gone through the necessary testing, and been approved for hire, although because of the strike he had not yet begun work.

> taken care of but one thing. And I said what's that? And he said you got to hire those two kids. And I said okay.

Gordon Campbell and Todd Fante were, he testified, thereafter hired in the skilled trades position of vehicle builders.

The indictment alleged that Gordon Campbell and Todd Fante were not qualified for skilled trades or journeyman designation under Paragraph 178 of the 1993 National Agreement, and a great deal of trial testimony centered on that vigorously disputed contention.

Paragraph 178 is a definitional section, and sets forth four ways in which an individual may qualify for "journeyman/woman" status: (1) One "[w]ho has satisfactorily completed a bona fide apprentice training course with similar standards to the GM UAW apprentice training program;" (2) "One who has properly carried such journeyman/woman status in any General Motors plant under the terms of previous agreements between the parties;" (3) "One who has been reclassified as a journeyman/woman under the terms of the skilled trades section of this agreement;" or (4) "One, newly hired, who meets one of the above alternative requirements or can prove work experience in the trade at least equivalent to that on-the-job experience required for reclassification to journeyman/

woman status of those employees in training covered in Paragraph 166" of the Agreement, *i.e.*, eight years.[3]

A number of witnesses called by the government testified that, in their opinion, Fante and Campbell were not qualified under this provision. At the same time, the defense presented a good deal of testimony to the effect that they were.

There was also testimony to the effect that, under Appendix A to the National Agreement, General Motors was obligated to employ a system of preferences in filling positions, with "paragraph 96" and laid-off employees typically being entitled to preferred consideration. Although the testimony as to the precise nature of these preferences varied somewhat, it was clear that Gordon Campbell and Todd Fante, who were not employed at GM, would have been, at best, low on the list. Indeed, there was testimony that after they were hired, other workers filed grievances, and were given awards for pay they would have received had they been hired at the time that Fante and Campbell were.

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[3] Journeyman status, which is awarded by the employer, is to be distinguished from the possession of a journeyman card, a document issued by the union. Although possession of a union-issued journeyman card is generally taken by the company as sufficient evidence of a worker's qualification for journeyman status, it is not a requirement under Paragraph 178, and the company may award journeyman status whether or not the applicant has such a card.

At the same time, the testimony was to the effect that, pursuant to Paragraph Eight of the National Agreement – the "management's rights" provision, the decision on whether or not to hire a particular person is exclusively reserved to management. And the testimony was also to the effect that the Paragraph 178 criteria give rise to a "management responsibility."

REASONS FOR GRANTING THE WRIT

I. The decision of the Sixth Circuit upholding petitioner's conviction under 18 U.S.C. § 1951 is in conflict with *United States v. Enmons*, 410 U.S. 396 (1973), which significantly limits the application of the Hobbs Act in the context of collective bargaining activities

Count Two of the Indictment charged a violation of 18 U.S.C. § 1951, the Hobbs Act. It alleged that the defendants Douglas and Campbell conspired with William Coffey "and other persons both known and unknown . . . to obstruct, delay, or affect commerce . . . and the movement of articles in such commerce, by extortion . . . in that Defendants DONNY G. DOUGLAS, WILLIAM J. COFFEY, and JAY D. CAMPBELL did obtain and agree to obtain from GM property, to wit: the skilled trades and/or journeyman designation under Paragraphs 119 through 183 of the National Agreement dated November 2, 1996, and employment under that designation with associated wages and benefits for Gordon Campbell and Todd

Fante, whom the defendants knew were not qualified for such designation and employment under Paragraph 178 of such National Agreement . . . "

Under the Hobbs Act, "'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear. . . ." Thus, to be guilty of a violation of the statute, an individual must be shown to have engaged in, or agreed to engage in, an attempt to obtain property by conduct which is "wrongful."

It is, of course, well-established, that threats or fear of purely economic injury are sufficient to support a conviction under the Hobbs Act. *United States v. Cusmano*, 659 F.2d 714, 715 (6th Cir. 1981) (*Cusmano I*). At the same time, such threats, or fears, are the common currency of any business or commercial negotiation, and the stuff of which collective bargaining activities – and particularly strikes, and the threat of strikes – are made. And it is inarguable that the activities which formed the basis of this prosecution occurred in the heartland of collective bargaining activity: negotiations regarding the staffing of the mockup facility, the "paragraph 96 move," and the local labor agreement, as well as the 1997 strike. Critical to the question of whether criminal liability under the Hobbs Act may be predicated on these activities is whether they could be found to be "wrongful," as that term is used in the statute.

In *United States v. Enmons*, 410 U.S. 396 (1973), this Court directly confronted the question of the

meaning of the term "wrongful" in the context of collective bargaining activity – there, a strike during the course of which union members had resorted to acts of violence against the employer's property. The district court had dismissed the indictment as being beyond the reach of the Hobbs Act, and this Court affirmed, holding that "'wrongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'WRONGFUL' BECAUSE THE ALLEGED EXTORTIONIST has no lawful claim to that property." *Id.*, at 400 (capitalization in original). The Court went on to explain the kind of distinction which it understood this limitation to embody:

> Construed in this fashion, the Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoffs, and where unions used the proscribed means to exact "wage" payments from employers in return for "imposed, unwanted, superfluous and fictitious services" of workers. For in those situations, the employer's property has been misappropriated. But the literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks. In that type of case, there has been no "wrongful" taking of the employer's property; he has paid for the services he bargained for, and

> the workers receive the wages to which they are entitled in compensation for their services.

Ibid. (footnotes omitted).

In support of its conclusion the Court referred – in addition to the decisions referenced in the above passage – to the legislative history of the Act itself, which demonstrated congressional concern for its application in the area of labor-management disputes,[4] and the rule of lenity, as well as prudential concerns:

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[4] Specifically, the Court pointed to the statements of the Act's sponsor, as follows:

> Indeed, in introducing his original bill, Congressman Hobbs explicitly refuted the suggestion that strike violence to achieve a union's legitimate objectives was encompassed by the Act:
>
> > 'Mr. MARCANTONIO. All right. In connection with a strike, if an incident occurs which involves –
> >
> > 'Mr. HOBBS. The gentleman need go no further. This bill does not cover strikes or any question relating to strikes.
> >
> > 'Mr. MARCANTONIO. Will the gentleman put a provision in the bill stating so?
> >
> > 'Mr. HOBBS. We do not have to, because a strike is perfectly lawful and has been so described by the Supreme Court and by the statutes we have passed. This bill takes off from the springboard that the act must be unlawful to come within the purview of this bill.
> >
> > 'Mr. MARCANTONIO. That does not answer my point. My point is that an incident

(Continued on following page)

> Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests – for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Id., at 410 (citations omitted).

Subsequent circuit decisions have recognized that, at heart, "*Enmons* is a labor case," and the

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> such as a simple assault which takes place in a strike could happen. Am I correct?
>
> 'Mr. HOBBS. Certainly.
>
> 'Mr. MARCANTONIO. That then could become an extortion under the gentleman's bill, and that striker as well as his union officials could be charged with violation of sections is this bill.
>
> 'Mr. HOBBS. I disagree with that and deny it in toto.' 89 Cong.Rec. 3213.

Id., at 404-406 (footnotes omitted).

Enmons Court's thinking inextricably linked to that context. *United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), *cited with approval in United States v. Russo*, 708 F.2d 209, 215 (6th Cir. 1983). The case before the Court is likewise "a labor case," and the lessons of *Enmons* are therefore of prime importance, and in this context the central teaching of *Enmons* is the limitation inherent in the "wrongfulness" requirement.

There is, of course, a broad spectrum of "wrongs" which the law may seek to redress, in various ways. The penal law, however, is appropriately confined to the redress of "public," as opposed to "private" wrongs, which are the concern of the civil law of, for example, tort and contract – as the Court long ago recognized in *Huntington v. Attrill*, 146 U.S. 657, 668 (1892):

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. . . . [T]he latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl.Com. 2.

This distinction is one of continuing validity. *See, e.g., Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 765 (2005).

The Hobbs Act is, as the *Enmons* Court noted, a direct descendent of the Anti-Racketeering Act of 1934, 48 Stat. 979. *United States v. Enmons*, *supra*, at 401. That statute, like the Hobbs Act, contained the "wrongfulness" requirement, and defined it as follows: "As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory." Text of The Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, § 3(a), set forth in *Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 24 (2006). In *United States v. Bianchi*, 219 F.2d 182 (8th Cir. 1955), one of the decisions cited with approval by the *Enmons* Court in which "the Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoffs" *id.*, at 400, n. 4, the Eighth Circuit held that, even though this definitional provision was not carried forward into the Hobbs Act, Congress nonetheless intended to give the new provision a similar reach:

> We do not believe that Congress by omitting the definition of "wrongful" in the present Act intended to change the meaning of the word as defined in previous acts. So construed, the definition of extortion in the present statute is substantially the same as it was in the former statute.

Id., at 196.

Thus, at least in the context of this "labor case," the "wrongfulness" of a defendant's conduct must be of a criminal – a "public" – nature, and the conclusion

that "the obtaining of the property would itself be 'WRONGFUL' BECAUSE THE ALLEGED EXTORTIONIST has no lawful claim to that property" *id.*, at 400, must have its roots in the "public," or criminal law, not the "private," or merely civil.

Here, the sole basis for a finding of "wrongfulness" was the allegation that the defendants' conduct in seeking the hiring of Gordon Campbell and Todd Fante violated the collective bargaining agreement between General Motors and the United Auto Workers. This was the basis upon which the Sixth Circuit upheld petitioner's conviction:

> The evidence demonstrated that Douglas and Campbell had a purpose that violated the National Agreement – forcing General Motors to hire two people who were not qualified and did not have preference under the National Agreement. Even though labor negotiations were ongoing at the time, Douglas's and Campbell's demand that General Motors violate the National Agreement was an action "outside the traditional labor/management bargaining context" because they demanded something to which they had no legitimate right.

App. 5.

It is, however, fundamentally inconsistent with the legal landscape governing the convergence of collective bargaining and the Hobbs Act, as defined by *Enmons*, to allow the question of criminal liability to turn upon a question of contractual right – much

less contractual interpretation. Certainly the acts of violence which this Court held to be outside the scope of the Hobbs Act in *Enmons* were not of the sort which were defined or protected by any labor management agreement. What took them outside the reach of the Act was their "context" – a strike involving demands of precisely the kind which are the heart of labor-management relations. The "context" of the actions which were the subject was precisely the same – a strike involving demands of precisely the kind which are the heart of labor-management relations.

This is not to say that contractual rights and obligations are irrelevant to the issue of wrongfulness, but that, in the context of a labor dispute, *Enmons* counsels that findings of criminal misconduct cannot properly turn on nothing more than the meaning of a contractual provision. The decision of the Sixth Circuit ignores this fundamental teaching, and is in irreconcilable conflict with *Enmons*. Because of this conflict, and the importance of the issue to the field of labor-management relations, the Court should grant *certiorari* and, on plenary review, vacate petitioner's Hobbs Act conviction and sentence.

II. The decision of the Sixth Circuit upholding petitioner's conviction for conspiring to violate 18 U.S.C. § 186, and allowing the conviction of a labor organization representative absent any proof that their conduct contemplated their *own* receipt, either directly or indirectly, of any "thing" of financial or pecuniary "value," is in conflict with the plain meaning of the statute and with the decision of the Second circuit in *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990), creating a circuit split that this Court should resolve.

Count One of the Indictment charged a conspiracy to violate 29 U.S.C. §§ 186(a)(1) and (b)(1). Those provisions read as follows:

> **§ 186. Restrictions on financial transactions**
>
> (a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations
>
> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> * * *

> (b) Request, demand, etc., for money or other thing of value
>
> > (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

It is clear that upon its face the statute prohibits only demands, requests, or the like, or payments or deliveries, acceptances, or the like, of "money or other thing of value" to a person who is a "representative" of an employee (here, Jay Campbell or Donny Douglas) – not to an employee (here, Todd Fante or Gordon Campbell).

Moreover, while the statute does not define "thing of value" in the phrase "any money or other thing of value," a number of commonly accepted rules of statutory construction, as applied to the plain language of the statute, suggest that it is aimed at "things" of financial or monetary "value."

The decision of the Sixth Circuit, however, specifically permits a conviction under the statute absent any evidence of financial or pecuniary benefit, directly or indirectly, to a union representative. This is simply inconsistent with the statutory language.

It is to be noted, first, that the heading of § 186 refers to "Restrictions on *financial* transactions." (Emphasis supplied). Unquestionably, "'the title of a statute and the heading of a section' are 'tools

available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947)). Here, the section heading makes clear that it was with "financial" transactions between employers and union representatives that Congress was concerned.

Other limiting principles, most notably "the commonsense canon of *noscitur a sociis* – which counsels that a word is given more precise content by the neighboring words with which it is associated," *United States v. Williams*, 553 U.S. 285, 294 (2008), suggest that the fact that the general term "other things of value" follows the specific term "money" means that the "value" of those "other things" must be monetary to fall within the statute's reach. As the Court explained in *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003):

> [U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001); *see Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000) ("[W]ords . . . are known by their companions"); *Jarecki v. G.D. Searle & Co.*, 367

> U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961) ("The maxim *noscitur a sociis* is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress").

Here, the "thing of value" alleged in the Indictment was "the skilled trades and/or journeyman designation under Paragraphs 119 through 183 of the National Agreement dated November 2, 1996, and employment under that designation with associated wages and benefits for Gordon Campbell and Todd Fante . . . " Obviously, there was no agreement which contemplated that these alleged "things of value" would be given to, or accepted by, Douglas or Campbell or "to any representative of any of [GM's] employees, as subsection (a) of the statute requires. Moreover, there was simply no proof whatsoever that their receipt, actual or intended, had, or were intended to have, any financial or monetary benefit to any such "representative." Accordingly, it seems plain that the Indictment did not allege, and the proofs did not establish, a conspiracy to violate § 186(a)(1) or (b)(1).[5]

After a somewhat convoluted procedural history, the details of which are not relevant here, the Sixth Circuit turned aside these arguments:

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[5] It is, of course, a commonplace of conspiracy law that "the illegal object of the conspiracy is an essential element of the offense." *United States v. Schramm*, 75 F.3d 156, 163 (3d Cir. 1996).

1. Thing of Value

Douglas and Campbell protest that the word "other" in the phrase "money or other thing of value" constrains "thing of value" to things of monetary value. They also invoke ejusdem generis, a principle of statutory interpretation providing that, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Kefeler*, 537 U.S. 371, 384-85, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). But that rule applies to "list[s] of specific items separated by commas and followed by a general or collective term," not to a "phrase [that] is disjunctive, with one specific and one general category." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (refusing to apply the canon to the phrase "any officer of customs or excise or any other law enforcement officer"). The interpretive canon noscitur a sociis ("a word is known by the company it keeps") is also inapplicable when the statute provides few other analogous terms. *Id.* at 226. Additionally, "[t]he rule [of lenity] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text." *Salinas v. United States*, 522 U.S. 52, 66, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). And the name of the section, "[r]estrictions on financial transactions,"

should not trump the plain meaning of the statutory text.

"[A] fundamental canon of statutory construction is that 'when interpreting statutes, the language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear.'" *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir.2007) (quoting *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir.2001)). Douglas's and Campbell's position is contrary to the plain language of the statute. The statute's scope is not limited to only monetary items. Truly, of all the things in this world widely regarded as valuable, money and the like comprise only a small percentage. In the midst of the world's current financial struggles, when the unemployment rate in this country fluctuates between nine and ten percent, it is somewhat laughable to argue that Douglas and Campbell did not demand a "thing of value" when they demanded high-paying jobs for their cronies. The value of a job, especially one that pays $150,000 per year, is undeniable. In this case, the jobs demanded were things of value.

2. Third party beneficiaries

Douglas and Campbell argue that they could not have violated section 186(b)(1) because they themselves never received a "thing of value," but plainly, this is not a

requirement of the statute. Although section 186(b)(1) outlaws receiving or accepting things of value, it outlaws requesting or demanding them in the same statutory breath. The plain language of the statute applies to demanding things of value, even if they are intended for, and eventually go to, a third party.

Furthermore, we find agreement from our sister circuits. In *United States v. DeBrouse*, 652 F.2d 383, 387 (4th Cir.1981), the defendant, president of Teamsters Local 639, demanded that an employer pay $200 each week to a third party. The Fourth Circuit held that the defendant received "the precise thing of value [he] demanded, that is, payment of $200 a week to [the third party]. Therefore, the fact that the thing of value . . . took the form of payments to [a third party] does not place the transaction beyond the scope of the Act." *Id.* at 388. The court in *DeBrouse* also pointed out that Congress exempted a number of types of transactions from the Act, but it did not exempt payments to third party beneficiaries. *Id.* Additionally, in *United States v. Carlock*, 806 F.2d 535, 555 (5th Cir.1986), the Fifth Circuit adopted the third party beneficiary theory in DeBrouse.

Accordingly, Douglas and Campbell violated section 186(b)(1) by demanding a thing of value for third party beneficiaries.

App. 5-App. 8.

The Sixth Circuit noted the existence of other circuit authority that holds that a § 186 violation may be made out by the payment (or demand for) "things of value" to third persons, but those decisions, like that of the Sixth Circuit, ignore the statutory requirement that, to be within its reach, the "giving" (or contemplated "giving") must be by an employer "to any representative of any of his employees."

Thus, for example, in *United States v. DeBrouse*, 652 F.2d 383 (4th Cir.1981), the Fourth Circuit sustained a union representative's conviction under the statute where the representative demanded that an employer make payments of $200 a week to a nominee, Caprio, who performed no services for the employer. The paucity of the Fourth Circuit's analysis is illustrated by the semantic hoops it felt compelled to jump through to avoid the fact that the statute plainly requires that the "thing of value" be delivered to the representative: "the fact that the thing of value, which the employer delivered to DeBrouse, *took the form of payments to Caprio* does not place the transaction beyond the scope of the Act." *Id.*, at 388 (emphasis supplied). How, one wonders, could the author of the opinion have linguistically, much less logically, justified the concept that payments made to the nominee were somehow "delivered to" the union representative? And what could the "value" of such a delivery to the representative possibly have been?

The decision in that case seems, upon examination, to have been driven by a desire to close what the

panel perhaps perceived as a "loophole" left in the statute by Congress, which would have made it too easy to circumvent – and a disregard for the notion that it is for Congress, and not the courts, to make the necessary adjustments in the statutes it enacts.

Indeed, in *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), the Fifth Circuit noted this policy-driven aspect of *United States v. DeBrouse*, *supra*, and "[t]he debatable step" of "construing a payment to a third party who never forwards that money to the union official as being of value to the union official." *Id.*, at 555. The *Carlock* court elected to follow *DeBrouse*, but in order to do so was moved to create its own gloss to the *DeBrouse* formulation, by reading the Fourth Circuit as having "found the required value in the power exacted by the official to direct payments to others," although the *DeBrouse* panel made no such statement, and embracing the conclusion that "the power to direct payments to others is a thing of value." *Id.*, at 555.

More clear-eyed is the decision of the Second Circuit in *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990), in which it rejected the government's argument in a third-party benefit case that the union representative "received the intangible value of a continuing ability to influence corrupt union practices." *Id.*, at 347. "The statute's language," the court wrote, "speaks of a 'thing of value' or 'money,' clearly indicating that tangible items or at least valuable services or entitlements were contemplated." *Ibid.* "Moreover," the opinion continues, in language which precisely

describes the case at bar, "it is anything but clear what intangible benefit Cervone received, and that benefit thus seems not only intangible but also unidentifiable. We decline to adopt such a formless interpretation of this criminal statute . . . " *Ibid.* The trial judge's jury instructions in the instant case, and the Sixth Circuit's approval of them, expressly permitted – even invited – conviction on an "intangible benefits" theory, and such a "formless" reading of this statute should be rejected.

There is, on this issue – an important one in the area of labor-management relations – a clear circuit split, and the Sixth Circuit is on the wrong side of it. The Court should grant *certiorari* to resolve the divergence, and to instruct the courts below to respect the limitations and language of the statute – which the decision of the Sixth Circuit does not – and on plenary review should vacate petitioner's conviction and sentence under 29 U.S.C. § 186.

CONCLUSION

Because the decision of the Sixth Circuit Court of Appeals is contrary to this Court's decision in *United States v. Enmons*, the Court should grant *certiorari*, and, on plenary review, vacate petitioner's conviction and sentence under 18 U.S.C. § 1951.

The Court should also grant *certiorari* to resolve the conflict between the circuits as to the reach of 29 U.S.C. § 186, and, on plenary review, should reject the

analysis of the Sixth Circuit, clarify the requirements of the statute, and vacate petitioner's conviction under it.

Respectfully submitted,

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634 F.3d 852

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America,
Plaintiff-Appellee/Cross-Appellant,
v.
Donny G. DOUGLAS (07-1695/1850) and
Jay D. Campbell (07-1696/1851),
Defendants-Appellants/Cross-Appellees.
Nos. 07-1695, 07-1696, 07-1850, 07-1851.

Argued: Jan. 20, 2011.
Decided and Filed: Feb. 10, 2011.

ARGUED: N.C. Deday LaRene, LaRene & Kriger, P.L.C., Detroit, Michigan, Harold Gurewitz, Gurewitz & Raben, PLC, Detroit, Michigan, for Appellants. Kathleen Moro Nesi, Assistant United States Attorney, Detroit, Michigan, for Appellee. **ON BRIEF:** N.C. Deday LaRene, LaRene & Kriger, P.L.C., Detroit, Michigan, Harold Gurewitz, Gurewitz & Raben, PLC, Detroit, Michigan, for Appellants. Kathleen Moro Nesi, Assistant United States Attorney, Detroit, Michigan, for Appellee.

Before: MARTIN and MOORE, Circuit Judges; BUNNING, District Judge*

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* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

Defendants-Appellants-Cross-Appellees Donny Douglas and Jay Campbell appeal their convictions under the Labor Management Relations Act and the Hobbs Act. The United States cross-appeals their sentences. This case is now in its eighth year of litigation. Some of the underlying events transpired over seventeen years ago. Our court, and this same panel, heard a first appeal in this case more than six years ago. *United States v. Douglas*, 398 F.3d 407 (6th Cir.2005). For the following reasons, we **AFFIRM** Douglas's and Campbell's convictions, and although we would prefer to end these lengthy proceedings and give closure to the parties, we must **REMAND** for resentencing.

I. BACKGROUND

Donny Douglas and Jay Campbell worked as representatives of the United Auto Workers at the General Motors factory in Pontiac, Michigan. While negotiating with General Motors in the 1990s, they pressured General Motors several times to give highly skilled, "journeyman" jobs to two non-qualified relatives of Union members. These jobs paid as much as $150,000 per year, which was approximately double the salary of a production line worker. General Motors refused to comply each time. Acquiescing would have violated the hiring priorities set forth in the national and local agreements between the Union

and General Motors. The pressure came to a head when the Union was on strike in 1997, costing General Motors millions of dollars each day. On the eighty-seventh day of the strike, Union leaders met with representatives from General Motors to attempt to resolve all their issues and end the strike within twenty-four hours. The parties successfully resolved every official issue and grievance between them within twenty-four hours, but Douglas informed James Rhadigan, a General Motors official, that the strike would not end unless the two unqualified relatives of Union members finally received journeyman jobs. Rhadigan relented, the non-qualified relatives received the journeyman jobs, and the strike ended. As a result, multiple qualified journeyman applicants filed grievances with General Motors for not adhering to the hiring priorities laid out in the national and local agreements. Two qualified applicants were eventually hired on top of the two non-qualified Union member relatives.

The United States prosecuted Douglas and Campbell for violations of the Labor Management Relations Act and the Hobbs Act, claiming that they conspired to demand "things of value" and wrongfully used their labor positions to force General Motors to give jobs to two relatives of Union members. The district court dismissed the indictment as insufficient, but this Court reversed when this same panel found that the indictment sufficiently alleged the charges. Subsequently, Douglas and Campbell proceeded to trial and were convicted. They now appeal,

arguing that their convictions are not supported by sufficient evidence. The United States cross-appeals their sentences.

II. DISCUSSION

Douglas and Campbell appeal their convictions on several grounds: (1) their actions do not constitute a violation of the Labor Management Relations Act, and the district court's jury instruction regarding the Act was an incorrect statement of the law; (2) violating a labor agreement is not a criminally "wrongful" use of a labor position under the Hobbs Act; and (3) the United States's [sic] *Brady* violation at trial warrants a new trial. Additionally, Campbell argues that the district court's jury instruction constructively amended his indictment to include activity not covered by the Labor Management Relations Act.

The United States cross-appeals both sentences, claiming that the district court erred by: (1) using the Blackmail Sentencing Guideline, U.S.S.G. § 2B3.3, rather than the Extortion Sentencing Guideline, U.S.S.G. § 2B3.2; (2) failing to enhance Douglas's and Campbell's total offense level by calculating the loss to General Motors as zero; and (3) varying Douglas's sentence downward to match a departure that Campbell received due to his lung cancer.

A. The Labor Management Relations Act

The Labor Management Relations Act prohibits "any employer . . . to pay, lend, or deliver . . . any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." 29 U.S.C. § 186(a)(1). It further forbids anyone to "request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." *Id.* § 186(b)(1). Douglas and Campbell argue that their actions do not fall within the scope of the Act because: (1) they did not demand a "thing of value" for purposes of the Act; and (2) they did not personally receive any "thing of value." We review both questions of statutory interpretation de novo. *United States v. Gagnon*, 553 F.3d 1021, 1025 (6th Cir.2009). Douglas and Campbell also claim that the district court incorrectly instructed the jury as to section 186(b)(1). We review de novo this claim as well. *H.C. Smith Invs., L.L.C. v. Outboard Marine Co.*, 377 F.3d 645, 650 (6th Cir.2004) (citing *Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir.2000)). Lastly, we review constructive amendment claims de novo also. *United States v. Budd,* 496 F.3d 517, 528 (6th Cir.2007).

1. Thing of Value

Douglas and Campbell protest that the word "other" in the phrase "money or other thing of value" constrains "thing of value" to things of *monetary*

value. They also invoke *ejusdem generis*, a principle of statutory interpretation providing that, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). But that rule applies to "list[s] of specific items separated by commas and followed by a general or collective term," not to a "phrase [that] is disjunctive, with one specific and one general category." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (refusing to apply the canon to the phrase "any officer of customs or excise or any other law enforcement officer"). The interpretive canon *noscitur a sociis* ("a word is known by the company it keeps") is also inapplicable when the statute provides few other analogous terms. *Id.* at 226, 128 S.Ct. 831. Additionally, "[t]he rule [of lenity] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text." *Salinas v. United States*, 522 U.S. 52, 66, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). And the name of the section, "[r]estrictions on financial transactions," should not trump the plain meaning of the statutory text.

"[A] fundamental canon of statutory construction is that 'when interpreting statutes, the language of the statute is the starting point for interpretation, and it should also be the ending point if the plain

meaning of that language is clear.'" *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir.2007) (quoting *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir.2001)). Douglas's and Campbell's position is contrary to the plain language of the statute. The statute's scope is not limited to only monetary items. Truly, of all the things in this world widely regarded as valuable, money and the like comprise only a small percentage. In the midst of the world's current financial struggles, when the unemployment rate in this country fluctuates between nine and ten percent, it is somewhat laughable to argue that Douglas and Campbell did not demand a "thing of value" when they demanded high-paying jobs for their cronies. The value of a job, especially one that pays $150,000 per year, is undeniable. In this case, the jobs demanded were things of value.

2. Third party beneficiaries

Douglas and Campbell argue that they could not have violated section 186(b)(1) because they themselves never received a "thing of value," but plainly, this is not a requirement of the statute. Although section 186(b)(1) outlaws receiving or accepting things of value, it outlaws requesting or demanding them in the same statutory breath. The plain language of the statute applies to demanding things of value, even if they are intended for, and eventually go to, a third party.

Furthermore, we find agreement from our sister circuits. In *United States v. DeBrouse*, 652 F.2d 383, 387 (4th Cir.1981), the defendant, president of Teamsters Local 639, demanded that an employer pay $200 each week to a third party. The Fourth Circuit held that the defendant received "the precise thing of value [he] demanded, that is, payment of $200 a week to [the third party]. Therefore, the fact that the thing of value . . . took the form of payments to [a third party] does not place the transaction beyond the scope of the Act." *Id.* at 388. The court in *DeBrouse* also pointed out that Congress exempted a number of types of transactions from the Act, but it did not exempt payments to third party beneficiaries. *Id.* Additionally, in *United States v. Carlock*, 806 F.2d 535, 555 (5th Cir.1986), the Fifth Circuit adopted the third party beneficiary theory in *DeBrouse*.

Accordingly, Douglas and Campbell violated section 186(b)(1) by demanding a thing of value for third party beneficiaries.

3. Constructive amendment

Campbell contends that the jury instructions constructively amended the indictment by permitting the jury to convict on the basis of an uncharged third-party-beneficiary theory. We have explained that jury instructions constructively amend an indictment when they "modify essential elements of the offense charged [so] that there is a substantial likelihood that the defendant may have been convicted of an offense

other than the one charged in the indictment." *Budd*, 496 F.3d at 521 (internal quotation marks omitted).

In this case, the jury instructions did not constructively amend the indictment. The indictment alleges that the defendants "unlawfully . . . demand [ed] . . . the payment . . . of money and things of value in excess of $1,000.00 from General Motors, to wit: [1] the skilled trades and/or journeyman designation . . . and [2] employment under that designation with associated *wages and benefits for Gordon Campbell and Todd Fante,* whom the defendants knew were not qualified." (emphasis added). The indictment clearly put Douglas and Campbell on notice that the United States intended to proceed based upon a third-party-beneficiary theory. Jury instructions to that effect, then, did not constructively amend the indictment.

B. The Hobbs Act

Douglas and Campbell argue that their actions cannot form the basis for criminal liability and be "wrongful" under the Hobbs Act, 18 U.S.C. § 1951(b)(2), merely because the actions violated a collective-bargaining agreement between General Motors and the Union. *United States v. Enmons*, 410 U.S. 396, 401, 408, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), clarified that a "wrongful" purpose is one "that the union officials had no legitimate right to demand." While the defendants brief this point at length, this panel's prior decision in this case forecloses any argument about the legal standard:

> The defendants' demands, as alleged by the United States, are illegitimate, as they were in *Cusmano* and *Russo,* and constitute extortion *because they were in contradiction of the collective bargaining agreement and the union's Constitution.* Like the unlawful agreement at issue in *Cusmano,* the "skilled trades proposal" allegedly was obtained outside the traditional labor/management bargaining context. Also, the proposal, as alleged, contradicted a contractual provision between the union and the employers that gave preference to qualified, eligible employees of Pontiac in the distribution of skilled trade jobs and required at a minimum that those who are hired meet specific standards. We conclude that this is one of those instances, referenced by the Supreme Court in *Enmons,* to which the Hobbs Act would apply.

Douglas, 398 F.3d at 415 (emphasis added).

The only remaining question is whether the evidence at trial proved what the indictment asserted. We review "the evidence in the light most favorable to the prosecution" and ask whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under this standard, the evidence sufficed. The evidence demonstrated that Douglas and Campbell had a purpose that violated the National Agreement – forcing General Motors to hire two people who were not qualified and did not have preference under

the National Agreement. Even though labor negotiations were ongoing at the time, Douglas's and Campbell's demand that General Motors violate the National Agreement was an action "outside the traditional labor/management bargaining context" because they demanded something to which they had no legitimate right. The fact that other new positions were created does not alter our conclusion.

Accordingly, Douglas's and Campbell's actions fell within the Hobbs Act's definition of wrongful.

C. *Brady* Violation

Douglas and Campbell claim that the United States violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to disclose to them the conviction of one of their witnesses, Mark Hawkins. "[T]here is some confusion in this circuit with respect to the appropriate standard of review to apply to the denial of a motion for a new trial based on *Brady* violations." *United States v. Heriot*, 496 F.3d 601, 605 (6th Cir.2007) (documenting both de novo and abuse-of-discretion review, as well as one attempt to reconcile the two standards). However, we are not forced to decide between the two standards because our decision is clear even under the less deferential de novo standard.

Brady violations have three elements: "[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been

suppressed by the State, either willfully or inadvertently; [3] and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). To establish prejudice, "the nondisclosure [must have been] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 282, 119 S.Ct. 1936.

In 1988, approximately eighteen years before Douglas's and Campbell's trial, Hawkins pleaded guilty to attempted receipt or concealment of a stolen "pleasure boat" and "outboard motor" valued over one hundred dollars. He served thirty days in jail. Douglas and Campbell claim that they learned of the conviction only after the case had been submitted to the jury. The district court denied their motion for a new trial because the evidence of Hawkins's prior conviction was "immaterial." The crime occurred eighteen years before trial and eight years before the conduct for which the defendants were convicted. Moreover, Hawkins's testimony "consisted primarily of general background information on union matters, and any statements he made regarding Defendants' actions were corroborated by other witnesses."

The record bears out the district court's assessment. While Douglas and Campbell mention several matters about which Hawkins testified, they only point to one fact about which no other witness testified – that Douglas and Campbell protracted negotiations for the 1995 Validation Center move. Even assuming that they are correct, that fact was in no

way essential to either conviction. Therefore, Hawkins's testimony was not prejudicial, and Douglas's and Campbell's *Brady* claim fails.

D. Sentencing

The Probation Office's Presentence Reports calculated both Douglas's and Campbell's sentences using United States Sentencing Guideline section 2B3.3 for Blackmail and Similar Forms of Extortion, which provides a base offense level of nine. It added four points for a loss to General Motors exceeding $20,000 according to sections 2B3.3(b)(1) and 2F1.1(b)(1)(E), and two points for abuse of trust according to section 3B1.3. The resulting total offense level was fifteen. Both Douglas and Campbell had a criminal history category of I, yielding an advisory sentencing range of one and a half years to two years of imprisonment. The United States objected to the use of section 2B3.3 and argued instead for section 2B3.2. It also argued for a higher amount of loss, while Douglas and Campbell claimed that General Motors had lost nothing.

The district court sentenced both defendants according to section 2B3.3 and did not impose a loss enhancement. With an offense level of eleven, the resulting sentencing range was eight months to one year and two months of imprisonment. Because Campbell had lung cancer, the district court reduced his offense level by three. This resulted in a sentencing range of zero to six months of imprisonment. The

court sentenced Campbell to no imprisonment, two years of probation including six months of house arrest, and a $4,000 fine. The district court found that the section 3553(a) factors pointed toward "the same conclusion" for Douglas, reduced his total offense level by three, and imposed on Douglas the same sentence that Campbell had received. As opposed to Campbell, Douglas was healthy.

We review de novo whether a district court imposed the correct Sentencing Guideline. *United States v. Rivera*, 516 F.3d 500, 502 (6th Cir.2008). We will reverse a district court's finding of fact as to the loss attributed to a defendant only if it was clearly erroneous. *United States v. Jordan*, 544 F.3d 656, 671 (6th Cir.2009). However, we review de novo whether those factual findings warranted the district court's application of a certain Guideline. *United States v. Triana*, 468 F.3d 308, 321 (6th Cir.2006). Finally, we review sentences for abuse of discretion "[r]egardless of whether the sentence imposed is inside or outside the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

1. Using the blackmail versus extortion Guideline

The district court calculated the sentences using section 2B3.3, which governs "blackmail and similar forms of extortion where there clearly is no threat of violence to person or property." U.S.S.G. § 2B3.3 cmt. n. 1 (1995). That section defines blackmail as "a

threat to disclose a violation of United States law unless money or some other item of value is given." *Id.* The United States believes this choice was in error because section 2B3.2, "Extortion by Force or Threat of Injury or Serious Damage," better captures Douglas's and Campbell's conduct. *Id.* § 2B3.2. Section 2B3.2 applies when defendants make a threat:

> that reasonably could be interpreted as one to injure a person or physically damage property, *or any comparably serious threat,* such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or *a threat to cause labor problems, ordinarily should be treated under this section.*

Id. § 2B3.2 cmt. n. 2 (emphasis added). "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).[1] Section 2B3.2 sets a base offense level of eighteen, which is

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[1] *Stinson* is still good law after *Booker*. *See, e.g., United States v. Lay*, 583 F.3d 436, 446 (6th Cir.2009) ("The Commentary is 'authoritative.'" (quoting *Stinson*, 508 U.S. at 38, 113 S.Ct. 1913)).

twice the level of the blackmail Guideline in section 2B3.3.

The district court erred in applying section 2B3.3 and should have applied section 2B3.2. The difference between the two sections is the type of action threatened. Section 2B3.3 contemplates blackmail, which is defined as threatening to reveal a violation of federal law unless money or some other item of value is given, and similar threats. These types of threats involve making public an established fact; revealing that which already exists. In a sense, the victim of blackmail created the possibility for his injury. Quite differently, section 2B3.2 contemplates extortion by force or threat of injury or *serious damage*. These types of threats involve attacks upon more "innocent" victims who have in no way brought upon themselves any harm. Furthermore, both sections contemplate that a threat is covered by one or the other, not both. *See* U.S.S.G. § 2B3.3(c)(2) ("If the offense involved extortion by force or threat of injury or serious damage, apply § 2B3.2.").

Douglas and Campbell argue that the threat did not rise to the serious levels explained in section 2B3.2 because the threatened action would not have driven General Motors out of business. However, even assuming that an on-going strike would not have terminated General Motors entirely, that assertion ignores that the Pontiac plant might have been crippled or ruined. *Cf. United States v. Williams*, 952 F.2d 1504 (6th Cir.1991) (holding that section 2B3.2 applied where defendant threatened to thwart rezoning

of only *one* of real estate company's projects, which would have ruined the project and not the company as a whole); *United States v. Boggi*, 74 F.3d 470, 477 (3d Cir.1996) (holding that section 2B3.2 could apply where defendant made "threats of labor strikes and labor unrest that would result in economic injury, or ruin, for a given project" run by a real estate developer).

As the state of Michigan has sadly witnessed time and time again, large automotive manufacturers will close and consolidate plants if necessary, especially if doing so will result in more favorable labor conditions. Here, Douglas and Campbell threatened to prolong an already lengthy and costly strike. Even though General Motors is a multi-billion dollar company, its total worth is spread across many plants. Each day of the strike cost the Pontiac plant millions of dollars. Having lost millions of dollars each day for eighty-seven consecutive days, and facing an indefinite continuance of the strike, General Motors was threatened with undeniably grievous damages. This threat falls comfortably in line with the language in section 2B3.2, which covers serious threats to cause labor problems. In fact, the district court even admitted during Campbell's sentencing hearing that no blackmail had occurred in this case. Upon remand, the district court should apply section 2B3.2.

2. The loss to General Motors

The Probation Office proposed that General Motors suffered a loss of $30,474.76 as a result of

complying with Douglas's and Campbell's threat, and accordingly proposed a four-level enhancement to Douglas's and Campbell's offense levels. It measured the loss according to the salaries that General Motors paid to the unqualified relatives *before* GM "evaluated and retained" those men "based on their work performance." The United States, Douglas, and Campbell all objected to this recommendation. The district court rejected the loss enhancement entirely because the relatives performed their jobs well and caused General Motors no "workplace loss." In other words, General Motors obtained valuable services in exchange for the salaries that it paid. The United States appeals the loss determination.

First, the parties disagree about whether "workplace loss" is a meaningful measure in an extortion case. Douglas and Campbell cite many older cases in which courts concluded that the value of fraudulently provided services offset any loss for purposes of loss calculation. *See, e.g., United States v. Maurello*, 76 F.3d 1304, 1311-12 (3d Cir.1996) ("A client who obtains a satisfactory contract, settlement, or verdict has received something of value, irrespective of whether the lawyer was licensed at the time."). The United States distinguishes fraudulent services from the services provided in this case because "GM did not ask for these services; rather, it was forced to create two new positions" for people who were not qualified as journeymen. According to the record, General Motors might not have hired the unqualified relatives were it not for the threat, but the company

would have filled these positions with other applicants regardless. Furthermore, based on General Motors's choice to retain the employees, we can only assume that they performed satisfactorily and General Motors "got its money's worth." Therefore, the district court's finding that General Motors did not suffer any direct loss by hiring and paying the relatives is not clearly erroneous.

Second, the district court did not consider General Motors's consequential losses. Section 2B3.2 expressly anticipates consequential losses, *see* U.S.S.G. § 2B3.2 cmt. 5, but consequential losses are irrelevant under section 2B3.3, which looks only at "the greater of the amount obtained or demanded," U.S.S.G. § 2B3.3(b)(1). Because we conclude that the district court should have applied section 2B3.2, the district court should have also determined whether General Motors suffered any consequential losses.

Here, when General Motors hired the non-qualified relatives, they violated the hiring priorities set forth in the national and local Union agreements. As a result, multiple qualified Union members filed grievances because they should have had higher priority. General Motors had to pay $450,000 in legal fees, plus salaries and expenses for in-house counsel, and the salaries for two Union members who were hired as journeymen as a way to settle their grievances. The district court did not make a factual finding as to consequential damages. Therefore, on remand, the district court must calculate consequential damages to General Motors according to section

2B3.2(b)(2), and apply the appropriate offense level enhancement.

3. Downward variance in Douglas's sentence

While the district court's use of the incorrect Guidelines section requires that we remand this matter for resentencing, the United States additionally claims that Douglas's sentence is substantively unreasonable because the district court relied upon an improper factor – the disparity between Douglas's and Campbell's sentences. Pursuant to section 5H1.4, Campbell received a downward departure equivalent to three offense levels because he had lung cancer. Although Douglas was not ill, the district court reduced his offense level by the same amount to "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."

Sentencing decisions must be both procedurally and substantively reasonable. *Gall*, 552 U.S. at 51, 128 S.Ct. 586. Here, we need not address the substantive reasonableness of Douglas's sentence because it was procedurally unreasonable on two separate grounds. First, as we have already explained, the district court improperly applied the blackmail Guideline, resulting in a lower offense level and sentencing range. *Cf. United States v. Rosenbaum*, 585 F.3d 259, 265 (6th Cir.2009) ("A sentencing court commits procedural error by failing to calculate

(or improperly calculating) the Guidelines range. . . ."). Second, the district court reduced Douglas's offense level by three points without an applicable section of the Guidelines to support the reduction. *Cf. United States v. Goodman*, 519 F.3d 310, 323 (6th Cir.2008). The court admitted that "no departure [was] actually available," but reduced Douglas's offense level nevertheless so that it could give him a within-Guidelines sentence that was the same as Campbell's. When determining whether to vary downward from a properly calculated sentencing range, a district court may consider the sentencing disparity between co-defendants. *See United States v. Presley*, 547 F.3d 625, 631-32 (6th Cir.2008) (explaining that district courts may consider sentencing disparities between co-defendants if they so wish). However, reducing a defendant's offense level is a different animal entirely. It requires an applicable Guideline section, and here, while the disparity may have supported a downward variance, it did not support a reduction in Douglas's offense level.

III. CONCLUSION

Douglas and Campbell violated section 186(b) of the Labor Management Relations Act by threatening to lengthen a labor strike if jobs – things of value – were not given to two unqualified relatives of Union members – third party beneficiaries. Furthermore, because this action flew in the face of the national and local Union agreements, it was wrongful pursuant to the Hobbs Act. Accordingly, we **AFFIRM**

Douglas's and Campbell's convictions, but we **REMAND** for resentencing in accordance with this opinion.

398 F.3d 407

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Donny G. DOUGLAS; Jay Campbell,
Defendants-Appellees.
No. 03-2535.

Argued: Dec. 7, 2004.
Decided and Filed: Feb. 8, 2005.
Rehearing En Banc Denied May 3, 2005.

ARGUED: Kathleen Moro Nesi, Assistant United States Attorney, Detroit, Michigan, for Appellant. Harold Z. Gurewitz, Gurewitz & Raben, Detroit, Michigan, for Appellees. **ON BRIEF:** Kathleen Moro Nesi, Assistant United States Attorney, Detroit, Michigan, for Appellant. Harold Z. Gurewitz, Gurewitz & Raben, Detroit, Michigan, Peter J. Kelley, Ann Arbor, Michigan, for Appellees.

Before: MARTIN and MOORE, Circuit Judges; BUNNING, District Judge.*

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* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

MARTIN, Circuit Judge.

The United States appeals the district court's dismissal of its three-count indictment for insufficiency to plead an offense. The indictment charges Donny G. Douglas and Jay Campbell with conspiracy to violate federal labor law, conspiracy to extort, and mail fraud. We find that the indictment sufficiently alleges these offenses. Therefore, we REVERSE and REMAND.

I.

Donny G. Douglas is a former United Auto Workers International servicing representative, and Jay Campbell is a former United Auto Workers Local 594 Chairman. The Local 594 unit of United Auto Workers represents over five thousand production and skilled trade employees at General Motors's Pontiac Truck facilities. The terms of employment for Pontiac employees are set forth in the National Agreement between General Motors and International United Auto Workers and in the Local Agreement between Pontiac and Local 594. Once national union officials and General Motors management agree to the terms of the National Agreement, local union officials and Pontiac management negotiate the terms of the Local Agreement. The National Agreement provides that an employee may be eligible to receive the designation of "skilled tradesman" after completing various education and training requirements. A skilled tradesman

may bid upon various skilled trade positions, which pay in excess of $100,000 per year. Skilled tradesmen are hired according to a scale of preference: most preferred are skilled trade employees; next are current company employees who are qualified under the National Agreement; after that are current company employees. Outside applicants who do not meet the requirements set forth in the National Agreement are accorded no preference. The terms of the Local Agreement must not violate the terms of the National Agreement.

The charges against Douglas and Campbell are based on their conduct during contract negotiations for the Local Agreement between United Auto Workers Local 594 and General Motors. In 1995, defendants demanded that Pontiac hire Gordon Campbell, Jay Campbell's son, and Todd Fante, the son-in-law of a former Local 594 official – who were not employees of Pontiac or General Motors and were not qualified under the National Agreement as skilled tradesmen – into skilled trade positions. General Motors and United Auto Workers officials refused.

In 1996, General Motors and the International United Auto Workers signed a three-year National Agreement. Local 594 and Pontiac began negotiations for the Local Agreement. Defendants renewed their demands that Pontiac hire Campbell and Fante as skilled tradesmen.

In April 1997, Local 594 began a strike that lasted eighty-seven days. By July 1997, the parties

had settled all issues involved in the strike except for defendants' demands that Campbell and Fante be hired into skilled trade positions. The United States alleges that in order to end the strike Pontiac Truck agreed to create the two new positions and fill them with Campbell and Fante. As part of the Local Agreement, the parties signed a "skilled trades proposal," which the United States asserts signified Pontiac's acceptance of defendants' demand for the two new hires.

The Local 594 Constitution requires that new Local Agreements be ratified by the membership of Local 594. The United States alleges that defendants submitted the "skilled trades proposal" to Pontiac employees in an altered form that omitted the provisions for the two new positions. Pontiac employees ratified the proposal and, in August 1997, Fante and Campbell were hired to fill two new skilled trade positions. The United States alleges that "because their hiring violated the National Agreement, the [Local 594 Constitution,] and the Local Agreement, other employees reacted angrily and filed two grievances." The United States alleges that another Local 594 official, William Coffey – who was originally named as a defendant in this case but has since passed away – concealed that Campbell and Fante were not qualified by agreeing to withdraw those grievances and any other grievances related to the two new skilled trade positions.

Defendants were charged in 2002 in a three-count indictment. Count One alleged that defendants

violated 18 U.S.C. § 371 by conspiring to violate the Labor-Management Relations Act. The indictment identified the objects of the conspiracy as (1) the authority to amend the terms of the National Agreements and related documents and (2) the employment and skilled trades designation for Campbell and Fante. Count Two charged defendants with conspiring to obstruct, delay, and affect commerce in violation of the Hobbs Act, 18 U.S.C. § 1951. Count Three alleged that defendants used a scheme and artifice to defraud members of Local 594 of their contractual right to obtain skilled trade positions and to rely on the honest services of defendants as the union's negotiating officials.

Defendants moved to dismiss, arguing that the indictment failed to allege offenses and was preempted by federal labor law. The district court concluded that the indictment failed to allege offenses and dismissed the case without considering the preemption question.

II.

An indictment is sufficient if it "set[s] forth the offense in the words of the statute itself, as long as 'those words . . . fully, directly, and expressly . . . set forth all the elements necessary to constitute the offense intended to be punished.'" *United States v. DeAndino*, 958 F.2d 146, 147 (6th Cir.1992) (quoting *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)). In dismissing the

indictment in this case, the district court applied the rule of lenity, which limits the expansion of criminal statutes by means of defining essential terms or elements of wrongful conduct to include "constructive" offenses or offenses not intended by Congress. According to the rule, a statute must be strictly construed, *United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), and constructive offenses should be avoided, *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The district court construed the statutes at issue to exclude defendants' conduct, concluding that "the indictment is only sufficient if the Court were to create numerous constructive offenses." Accordingly, we must consider what offenses, and their elements, Congress intended to prohibit when it enacted the statutes at issue in this case. Because Congress's intent is essentially a question of statutory interpretation, we review the district court's decision de novo. *United States v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir.1994); *United States v. Brown*, 915 F.2d 219, 223 (6th Cir.1990).

III.

1. Count One

Count One alleges that defendants violated 18 U.S.C. § 371, which criminalizes a conspiracy to commit a crime against the United States or to defraud the United States by conspiring to violate the

Labor-Management Relations Act, 29 U.S.C. §§ 186(a)(1), 186(b)(1). Section 186(a)(1) provides:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor or consultant to an employer, or who acts in the interest of an employer, to pay, lend, or deliver, or agree to pay, lend, or deliver any money, or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce.

Section 186(b) provides:

> It shall be unlawful for any person to request, demand, receive or accept or agree to receive or accept any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Violations of sections 186(a) and 186(b) both require a showing of a "thing of value." The indictment identifies the objects of the conspiracy as (1) the authority to amend the terms of the National Agreement and related documents and (2) the employment and skilled trades designation for Campbell and Fante.

Defendants argued, and the district court agreed, that neither the authority to amend the National Agreement nor the procurement of jobs for third parties qualifies as a thing of value under the statute. The district court reasoned that because defendants

did not conspire for "things of value," they did not engage in the acts prohibited by either section of the Act. The court concluded that absent an allegation that defendants violated the substantive statute, they necessarily could not have violated section 371, and, thus, the indictment did not allege a criminal offense.

The United States argues that in making a determination regarding "things of value," the district court acted beyond its authority.[1] Instead, the government contends, the district court should have considered only the sufficiency of Count One in alleging a violation of section 371, and to that analysis the "thing of value" inquiry is irrelevant.

We agree that the district court's scope of analysis was improper. It has been determined, by this Court and in other circuits, that a conviction under section 371 does not require the government to prove a violation of a separate substantive statute. *See United States v. Khalife*, 106 F.3d 1300, 1303 (6th Cir.1997) (citing *United States v. Jackson*, 33 F.3d 866, 871-72 (7th Cir.1994) (holding that the government may allege a violation of a specific statute to demonstrate a conspiracy to defraud the United States, but such an allegation is only "a way of consummating the conspiracy . . . which, like the use of a gun to effect a conspiracy to murder, is purely

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[1] The United States has elected not to appeal the district court's finding that the employment and authority to amend were not "things of value."

ancillary to the substantive offense") (quoting *Glasser v. United States*, 315 U.S. 60, 67, 62 S.Ct. 457, 86 L.Ed. 680 (1942))). "[I]t is unnecessary to refer to any substantive offense when charging a section 371 conspiracy to defraud, and it is also unnecessary to prove the elements of a related substantive offense." *Khalife*, 106 F.3d at 1303. Therefore, the allegations in the indictment that defendants violated section 371 need not include reference to "things of value" under 29 U.S.C. § 186.

Given this, we must determine whether the indictment satisfies the requirements of Federal Rule of Criminal Procedure 7(c)(1), which states:

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

We have said that to be sufficient an indictment must satisfy two requirements: "first, the indictment must set out all of the elements of the charge offense

and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on the same facts." *United States v. Martinez*, 981 F.2d 867, 872 (6th Cir.1992) (citing *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)).

The elements of a section 371 conspiracy to defraud are: (1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) the intent to commit the substantive offense, i.e., to defraud the United States. *See Khalife*, 106 F.3d at 1303 (quoting *Jackson*, 33 F.3d at 872). Count One describes the objective of the conspiracy, the means and methods in furtherance of that objective, and the overt acts taken to achieve it. As stated above, the United States need not prove the illegal objective, the intent, or the violation of the substantive offense. Count One sets forth all of the elements of the offense, gives notice to the defendant of the charges, and is sufficiently specific to enable defendants to plead double jeopardy in a subsequent proceeding if charged with the same crime based on the same facts. *See id.; Martinez*, 981 F.2d at 872. Thus, Count One sufficiently alleges a violation of section 371.

2. Count Two

Count Two charges defendants with conspiring to obstruct, delay, and affect commerce in violation of the Hobbs Act, 18 U.S.C. § 1951. In essence, this is an extortion claim: the United States claims that defendants obtained employment for Campbell and Fante by inducing General Motors through the wrongful use of fear of economic harm, i.e., a prolonged strike. The Act defines extortion in part as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2). Count Two alleges that defendants obtained the consent of Pontiac to hire Campbell and Fante – as evidenced by Pontiac's "skilled trade proposal" – by refusing to agree to the terms of the Local Agreement until the two jobs were secured.

The district court determined that Count Two was insufficient because it failed to allege an illegal objective, citing to the Supreme Court's holding in *United States v. Enmons*, 410 U.S. at 400, 93 S.Ct. 1007. In *Enmons*, the Supreme Court limited the Hobbs Act

> to those instances where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property. Construed in this fashion, the Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoff, and where

> unions used the proscribed means to exact "wage" payments from employers in return for "imposed, unwanted, superfluous, and fictitious services" of workers.

Id. The Court held that when force is used to obtain legitimate union demands, such as higher wages, the Hobbs Act does not apply. *Id.* at 410, 93 S.Ct. 1007.

Based on that holding, the district court found that negotiating for additional jobs is a legitimate objective, and that, because defendants' actions were merely negotiating tactics for additional jobs, their objective was legitimate. The court explained that it is only an unfair labor practice to cause an employer to pay a thing of value "for services which are not performed or not to be performed." It distinguished that situation from cases, such as this one, where an employer is forced to pay for services which were actually performed or intended to be performed. Thus, it concluded, the Count alleges no criminal act.

The United States argues that the court erred in finding that defendants' objective was legitimate because the demand for the two jobs was contrary to an existing collective bargaining agreement and to the Local 594 Constitution. Based on this Court's holding in *United States v. Cusmano*, 729 F.2d 380, 381-83 (6th Cir.1984), the United States argues that an objective that violates an existing collective bargaining agreement cannot be regarded as legitimate under *Enmons*, even where the jobs obtained are duly

performed. The government contends that because the indictment alleges that defendants' objective violated the United Auto Workers Constitution and the National Agreement, it necessarily alleges an illegal objective.

As the United States indicates, this Court distinguished the holding of *Enmons* in *Cusmano*, where we explained that the Hobbs Act presents no bar to prosecution where an accused is alleged to have extorted property to which he has no lawful claim. 729 F.2d at 381-83 (citing *United States v. Iozzi*, 420 F.2d 512, 515 (4th Cir.1970)). The *Cusmano* court held that Cusmano's activities in extracting money, to which he had no lawful claim, through an agreement that he forced on his employees was not protected under the rule of *Enmons*. *Id.* at 382, 93 S.Ct. 1007. The agreement between Cusmano's company and its employees provided that it would be "unlawful and illegal" for the company to deduct the welfare and pension payments from the employees' gross earnings. *Id.* at 382-83, 93 S.Ct. 1007. The agreement was not the result of any collective bargaining between the company and the employee's union, "but instead was secured through the coercive tactics of Cusmano and his codefendants [who were prosecuted in the companion case of *United States v. Russo*, 708 F.2d 209 (6th Cir.1983)]." *Id.* at 383. This Court concluded:

> We believe Cusmano's attempt to characterize his behavior as protected labor activity stretches *Enmons* too far. He claims he had a legal right to bargain with his employees in

> an attempt to reduce [the company's] labor costs. Although he might have this right, the facts proven at trial do not establish any legitimate bargaining by Cusmano in an attempt to reduce [the company's] labor costs. Instead, the evidence discloses that he and his codefendants coerced the [employees] into an illegal agreement which required the [employees] to pay for pension contributions which Cusmano should have paid. The facts demonstrate Cusmano attempted to obtain by wrongful means and under the guise of a "service charge" an objective which the parties' own contract specifically declared "unlawful and illegal." This conduct went beyond legitimate labor tactics and violated the Hobbs Act.

Id. (citations omitted). We also concluded that, had we applied Cusmano's view that his activities were legitimate and protected under *Enmons*, the Hobbs Act would then "pose no bar against the utilization of sham agreements even though such agreements were obtained outside the traditional labor/management bargaining context." *Id.* We declined to adopt such a restricted view. *Id.*

Here, the district court discussed the application of *Cusmano* and its companion case, *United States v. Russo*. The court found that those cases are distinguishable

> because [in *Cusmano* and *Russo*] the employer made its demands on individual employees to pay extra fees to the employer, to

> which the employer was not entitled under the existing contract and which the membership collectively rejected. Here, Defendants' alleged demands were made in the course of negotiating the new local collective bargaining agreement which, if the parties reached an agreement, could have provided for the two positions, and thus the positions would not have been in violation of at least one of the governing contracts. Whether or not the inclusion of that provision in the new agreement between Pontiac Truck and Local 594 would have violated other contractual provisions between the [United Auto Workers] and General Motors should not be the basis of a criminal charge of extortion – that is an issue to be resolved between the [union], Local 594, General Motors and Pontiac Truck through the established labor relations' dispute framework.

As this statement indicates, the district court found that demands by force for an objective that violates a contract between the union and the employers do not constitute extortion when resolution of such violation is better achieved in the traditional labor-management dispute resolution process.

We disagree. The defendants' demands, as alleged by the United States, are illegitimate, as they were in *Cusmano* and *Russo*, and constitute extortion because they were in contradiction of the collective bargaining agreement and the union's Constitution. Like the unlawful agreement at issue in *Cusmano*, the "skilled trades proposal" allegedly was obtained

outside the traditional labor/management bargaining context. Also, the proposal, as alleged, contradicted a contractual provision between the union and the employers that gave preference to qualified, eligible employees of Pontiac in the distribution of skilled trade jobs and required at a minimum that those who are hired meet specific standards. We conclude that this is one of those instances, referenced by the Supreme Court in *Enmons*, to which the Hobbs Act would apply. Furthermore, the indictment sufficiently alleges that defendants forcefully coerced Pontiac negotiators to exact wage payments in return for the imposed and unwanted services of unqualified, ineligible non-employees. Therefore, we reverse the ruling of the district court as to Count Two.

3. Count Three

Count Three charges defendants with mail fraud in violation of 18 U.S.C. §§ 1341, 1346. The indictment alleges a scheme to deprive Local 594 members of the following rights conferred by the National Agreement and the United Auto Workers Constitution: (1) the contractual right to obtain a skilled trades designation, (2) the skilled trades designation and associated wages and benefits for two undetermined qualified employees, and (3) the honest services that defendants owed to Local 594 members to faithfully and fairly represent them. The district court, relying heavily on the Third Circuit's decision in *United States v. Boffa*, 688 F.2d 919 (3d Cir.1982), held that neither the first two rights – the so-called

property allegations – nor the honest services allegation is sufficient to support an indictment for mail fraud. Thus, we consider the scope of the mail fraud statute and the application of the Third Circuit's ruling to this case.

The mail fraud statute provides criminal penalties for devising "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. The Supreme Court long ago recognized that a "scheme or artifice to defraud" is not limited to the common law of fraud and false pretenses, *Durland v. United States*, 161 U.S. 306, 313-14, 16 S.Ct. 508, 40 L.Ed. 709 (1896), and since then courts have struggled to define the contours of the mail fraud statute. Generally, courts have construed it expansively to prohibit all schemes to defraud by any means of misrepresentation that in some way involve the use of the postal system. *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir.1978). Most courts have rejected the argument that the statute was intended to prohibit only schemes to defraud individuals of money or property, *see, e.g., United States v. States*, 488 F.2d 761, 763-64 (8th Cir.1973), and instead have held that the statute prohibits schemes to defraud individuals of "intangible" interests or rights as well. *See United States v. Bronston*, 658 F.2d 920, 927 (2d Cir.1981) (client's right to "undivided loyalty" of attorney).

In *United States v. Boffa*, the Third Circuit agreed that the statute's scope is expansive, but

found that, as a matter of statutory construction, it was unwilling to sanction mail fraud prosecutions for schemes to deprive individuals of a particular intangible right when such a prosecution would contravene the intent of the Congress that created that right. 688 F.2d at 930 (citing *Great Am. S & L Assn. v. Novotny*, 442 U.S. 366, 372-76, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979) (finding civil rights action under 42 U.S.C. § 1985(3) based on deprivations of rights guaranteed by the Civil Rights Act of 1964 impermissible where such action would undermine policies of Title VII of that Act)). In *Boffa*, the National Labor Relations Act provided the rights of which the employees were allegedly deprived, and it provided the remedy, which held no criminal consequences, for such deprivation. *Id.* The Third Circuit stated that it therefore perceived a strong indication that Congress did not intend for unfair labor practices related to the National Labor Relations Act to have any criminal consequences. *Id.* Because Congress had already provided specific remedial provisions for the violation of rights under that Act, the Third Circuit held that a scheme to deprive employees of their rights under that Act does not constitute a crime under the mail fraud statute. *Id.* It left open the possibility of applying the mail fraud statute to the deprivation of economic benefits unrelated to the National Labor Relations Act.

Indeed, the Third Circuit further held in *Boffa* that such acts do have criminal consequences under the mail fraud statute. *Id.* The indictment in that

case alleged that defendants deprived employees of the "economic benefits they enjoyed through rights they had under the collective bargaining agreement." *Id.* The Third Circuit held that this scheme, which deprived employees of economic benefits such as wages and seniority rights, "lies squarely within the ambit of the mail fraud statute," because the source of such benefits was the contract between [defendants] and the employees." Thus, while deprivation of rights guaranteed by the National Labor Relations Act may, according to the Third Circuit, be vindicated solely through that Act's procedures for unfair labor practice disputes, schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement are subject to the criminal sanctions set forth in the mail fraud statute. *Id.* (citing *United States v. McNeive*, 536 F.2d 1245, 1248-49 (8th Cir.1976) ("There can be little doubt that . . . schemes are within the scope of section 1341 [when] they involve calculated efforts to use misrepresentation or other deceptive practices to induce the innocent or unwary to give up some tangible property interest.")). We agree with that decision, and now look to determine whether the rights at issue in this case were guaranteed by the collective bargaining agreement.

a. Property Allegations

The government argues that the right to compete is an economic benefit guaranteed by the collective bargaining agreement, and, according to the Third

Circuit's decision in *Boffa*, is a property interest whose deprivation is subject to criminal consequences under the mail fraud statute. In response, the district court held that

> the bargaining agreements, at most, guaranteed the membership the right to compete for skilled trade positions before any outside hires were considered for the positions, and that scheming to deny membership the right to compete for a job does not reach the level of scheming to deny membership wages which were promised in the agreements.

Basically, the court held that the right to compete for jobs may be valuable, but it is not valuable enough to constitute a property interest subject to the protections of the mail fraud statute. We must determine whether the right to compete constitutes a sufficient property interest.

The government explains that the collective bargaining agreement requires that skilled trade positions be filled by only qualified applicants and gives hiring preference to skilled trade employees. The government argues that this agreement guarantees wages and other financial benefits to qualified employees, and that such benefits constitute property. It cites to decisions of other circuits, including the Third Circuit's decision in *Boffa*, holding that wages and other financial benefits guaranteed by collective bargaining agreements are sufficient to constitute property for purposes of mail fraud convictions. *See United States v. Palumbo Bros., Inc.*, 145 F.3d 850,

873 n. 3 (7th Cir.1998); *Boffa*, 688 F.2d at 930. The district court distinguished those cases because they involved wages for active positions – i.e., positions currently filled by employees – that were subject to renegotiation, whereas this case involved only a right, held by qualified employees yet determined, to earn those wages.

The government disputes the court's distinction. At issue in *Boffa* were seniority rights that were used to determine which employee-drivers could bid on particular driving assignments. The government argues that the seniority rights at issue in that case are akin to the right to compete in this case: both rights are "job-bidding" rights and both fundamentally provide the right to compete for economic benefits and wages. However, in *Boffa*, the employees lost their wages as a result of unfair labor practices; here, the employees lost their right to compete for wages sometime in the future as a result of unfair labor practices. To the district court, the difference between workers currently employed and workers who may be employed sometime in the future was significant. The court, noting the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), which held that unissued government licenses are not property, determined that the right to compete for a job is more akin to an unissued government license; neither rises to the level of wages and therefore does not constitute property for purposes of a mail fraud conviction. The district court found that the government, in aligning

the right to compete with the right at issue in *Boffa*, was "stretching too far-scheming to deny membership the right to compete for a job does not reach the level of scheming to deny membership wages which were promised in the agreements."

We disagree. Although proof at trial may undermine the government's case, for purposes of the indictment the government has pleaded sufficiently. We are persuaded by the government's argument that, were the right to compete to have such little value – indeed, value equivalent to an unissued government license – then the union would not bother to bargain collectively for this hiring system. We find this right to be similar enough to the right at issue in *Boffa* to follow the Third Circuit's decision. The right to compete guaranteed by the collective bargaining agreement in this case is sufficient to constitute property for purposes of the mail fraud statute.

b. Honest Services

Count Three also alleges a mail fraud scheme in violation of 18 U.S.C. § 1346, which explicitly prohibits a "scheme or artifice to deprive another of the intangible right of honest services." The indictment states that defendants intended to defraud the members of Local 594 of "[t]he honest services of defendants owed to Local 594 members pursuant to Article 19, of the [United Auto Workers] Constitution, Section 501(a) of the Labor Management Reporting and Disclosure Act, and the defendants' duty to faithfully

and fairly represent the members of Local 594 as labor representatives." As the district court noted, Congress passed section 1346 in response to the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), where the Court held that the mail fraud statute did not include schemes to defraud others of honest services. *See United States v. Frost*, 125 F.3d 346, 364 (6th Cir.1997).

Subsequently, in *Frost,* 125 F.3d at 364, this Court discussed the limits of an honest services claim. We said:

> Unlike a defendant accused of scheming to defraud another of money or property, a defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim. Rather, the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim.

The district court found that this statement in *Frost* identifies the elements of the honest services claim, and that the government could satisfy all of these elements except for the breach that would create an economic risk. The court found that the alleged breach – that defendants submitted a misleading contract for the membership's ratification and withdrew all grievances filed by local members regarding the hiring of Campbell and Fante – was

insufficient because it constituted merely an unfair labor practice that is not properly the subject of criminal liability. The court cited to *Boffa*, where the Third Circuit said that to "permit mail fraud prosecutions grounded on unfair labor practices would be to impose criminal penalties for conduct that, until now, has been remediable solely under the [National Labor Relations Act]."

The government contends that the "breach" element identified by the district court is not actually an element of the honest services claim. The government argues that this Court has only identified the "breach" issue as an evidentiary burden, and therefore it is not properly the subject of a sufficiency-of-the-indictment inquiry. *Frost*, 125 F.3d at 367-69. The government, citing to *Frost* and the case quoted therein, *United States v. Oldfield*, 859 F.2d 392, 400 (6th Cir.1988), identifies the true elements of the claim as these: (1) devising or intending to devise a scheme to defraud (or to perform fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. It explained that the *Frost* court's discussion of the "breach" issue in the paragraph quoted above occurred in an analysis and review of jury instructions concerning what the government was required to prove to establish that private individuals deprived their employer of the right to their honest services, *Frost*, 125 F.3d at 367-69; it did not occur in the discussion of the elements of the offense that must be stated in the indictment. Moreover, the government

argues, the *Frost* court explicitly characterized the "breach" issue as an evidentiary burden. *Id.* at 369 ("Unlike a defendant accused of scheming to defraud another of money or property . . . a defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim. Rather, the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim. We do not believe that this standard imposes an especially rigorous evidentiary burden upon the prosecution."). "Nothing in *Frost*," the government argues, "suggests that [the] elements of proof (as opposed to the elements of the offense) must be alleged in the indictment."

The government accurately states the elements of the honest services charge. The indictment has only to allege that defendants devised a scheme to defraud, involving use of the mails for the purpose of executing the scheme. The indictment sufficiently makes these allegations.

4. Preemption

Because the district court dismissed the indictment as insufficient, it did not discuss defendants' argument that the charges are preempted by the National Labor Relations Act. However, an appellate court may affirm a decision of the district court if that decision is correct for any reason, including a reason

not considered by the district court. *Loftis v. United Parcel Serv.*, 342 F.3d 509, 514 (6th Cir.2003). In the interest of judicial economy, we now consider the issue of preemption. *See Holloway Constr. Co. v. United States Dep't of Labor*, 891 F.2d 1211, 1212 (6th Cir.1989).

Defendants argue that the alleged violations of 29 U.S.C. § 186, 18 U.S.C. § 1951, and 18 U.S.C. §§ 1341, 1346 are all "inextricably intertwined" with sections 7 and 8 of the National Labor Relations Act, because they all depend on a violation of the collective bargaining agreement. Therefore, the alleged violations are preempted under the *Garmon* doctrine. *See Garmon*, 359 U.S. at 245, 79 S.Ct. 773. At the outset, we note that there are no issues concerning 29 U.S.C. § 186, because, as we said above, it is not necessary to show any violation of that statute for purposes of this appeal. Thus, defendants' arguments relating to 29 U.S.C. § 186 are moot. We consider only the questions raised by defendants' preemption argument relating to 18 U.S.C. §§ 1951, 1341, 1346, and hold, for the reasons below, that preemption is unwarranted.

"As a general rule," *Garmon* establishes that "federal courts do not have jurisdiction over activity which is 'arguably subject to § 7 or § 8 of the [National Labor Relations Act],' and they 'must defer to the exclusive competence of the National Labor Relations Board.'" *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982) (quoting *Garmon*, 359 U.S. at 245, 79 S.Ct. 773). Under the doctrine, a federal district court may not have

jurisdiction to determine whether an employer violates the National Labor Relations Act by allegedly engaging in unfair labor practices. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 4, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988); *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 74, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 743, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988); *Storey v. Local 327, Int'l Bhd. of Teamsters*, 759 F.2d 517, 520 (6th Cir.1985) (noting that when *Garmon* applies, "neither state nor federal courts have subject matter jurisdiction").

Like many general rules, however, this one contains exceptions. First, "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975); *accord Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 610-11 (6th Cir.2004). And second, federal courts may decide criminal charges that allegedly involve federal labor law. *Palumbo*, 145 F.3d 850, 863 (holding as a matter of first impression that charges in a criminal indictment are not preempted by federal labor law, even assuming that the alleged acts underlying the indictments fall within the scope of federal labor law); *Boffa*, 688 F.2d at 931-33 (holding that *Garmon* did not preempt the court's consideration of a federal criminal statute prohibiting mail fraud). Because we believe, as our

sister circuits have held, that *Garmon* was not intended to affect a district court's jurisdiction to hear criminal charges, we need not consider the issue of whether the federal labor law issues in this case are merely collateral.

It would be entirely inappropriate to strip federal courts of criminal jurisdiction merely because the criminal charges relate to federal labor law. We agree with the Third Circuit's decision in *Boffa*, which reasoned that when this kind of alleged conflict occurs, preemption would only be appropriate if, by enacting the National Labor Relations Act, Congress had intended to repeal the existing criminal statute. *Boffa*, 688 F.2d at 932-33. The *Boffa* court found no indication that Congress had such intention, and therefore held that *Garmon* preemption was inappropriate. *Id.* We also find no such indication. Therefore, we hold that *Garmon* preemption does not apply.

IV.

For the foregoing reasons, we REVERSE the district court's dismissal and REMAND for further consideration.

2006 WL 3694618 (E.D.Mich.)

United States District Court, E.D. Michigan,
Southern Division.

UNITED STATES of America, Plaintiff,
v.
Jay D. CAMPBELL and
Donny G. Douglas, Defendants.

No. 02-80863.
Dec. 13, 2006.

James M. Wouczyna, Vincent Falvo, U.S. Attorney's Office, Detroit, MI, for Plaintiff.

Peter J. Kelley, Ann Arbor, MI, for Defendants.

ORDER DENYING DEFENDANTS' (1) MOTION FOR JUDGMENT OF ACQUITTAL, (2) MOTION FOR A NEW TRIAL UNDER RULE 33, (3) MOTION FOR A NEW TRIAL UNDER BRADY V. MARYLAND, AND (4) MOTION FOR ARREST OF JUDGMENT

NANCY G. EDMUNDS, United States District Judge.

This matter came before the Court on several post-verdict motions filed by Defendant Jay Campbell and Defendant Donny Douglas (collectively "Defendants") on July 31, 2006. On June 27, 2006, Defendants were each convicted of two counts of conspiracy, related to using their union positions to obtain skilled trade jobs for unqualified individuals. Before this Court are the following motions related to this verdict: (1) motion for judgment of acquittal under Rule

29(c) of the Federal Rules of Criminal Procedure, (2) motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure, (3) motion for a new trial under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and (4) motion for arrest of judgment under Rule 34 of the Federal Rules of Criminal Procedure. For the reasons listed below, the Court DENIES each of Defendants' motions.

I. BACKGROUND

The factual background of this case is well established in the existing record, and needs no further elaboration here. Defendants were each convicted of two counts of conspiracy for their actions in demanding that two unqualified individuals, Gordon Campbell and Todd Fante, be given skilled trade positions at a time when Defendants were engaged in bargaining negotiations with General Motors. Gordon Campbell is Defendant Campbell's son, and Fante is the son-in-law of another former UAW official. Prior to trial, this Court dismissed the indictment against Defendants for failure to allege a criminal offense, but the Sixth Circuit subsequently reversed, and the case returned to this Court. A jury found Defendants guilty on June 27, 2006, and Defendants filed the instant motions seeking a number of post-trial remedies on July 31, 2006.

II. ANALYSIS

A. Defendants are not Entitled to a Judgment of Acquittal Under Rule 29(c)

Defendants assert that two of the jury's findings were not supported by sufficient evidence: (1) that Defendants received a "thing of value" required to violate 29 U.S.C. § 186, and (2) that Defendants acted wrongfully in obtaining jobs for the two unqualified individuals. Defendants first argument also incorporates their view that, because they did not personally receive the skilled trade positions, they did not violate 29 U.S.C. § 186, since they did not personally receive a prohibited thing of value under the statute.

1. Standard of review

This Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). "In deciding whether the evidence is sufficient to withstand a motion for an acquittal, and support a conviction, the court views all evidence in the light most favorable to the prosecution and determines whether there is any evidence from which a reasonable jury could find guilt beyond a reasonable doubt." *United States v. Talley,* 164 F.3d 989, 996 (6th Cir.1999). The court does not independently weigh the evidence or assess the credibility of trial witnesses. *Id.* It must, however "consider circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought

to be established." *United States v. Fusero*, 106 F.Supp.2d 921, 926-27 (E.D.Mich.2000) (internal quotation marks and citation omitted).

2. Jobs for others who were connected to Defendants constitute things of value for purposes of 29 U.S.C. § 186, and sufficient evidence exists to support the verdict that Defendants violated this statute

Prior to trial, this Court dismissed the indictment against Defendants, in part based upon the first argument that Defendants raise here. The Sixth Circuit subsequently reversed that opinion, however, and while that court did not specifically address the issue of whether 29 U.S.C. § 186 covered third party liability, its act of reversing the earlier dismissal in this case must be read to support such a result. *See U.S. v. Douglas*, 398 F.3d 407 (6th Cir.2005). If the Sixth Circuit had agreed with this Court's earlier conclusion that Defendants' conduct did not result in their obtaining a thing of value, then the earlier reversal would not have been necessary. Therefore, Defendants' argument on this point does not warrant further consideration.

In terms of evidence on the record, sufficient evidence exists from which a reasonable jury could have found Defendants guilty of this charge. Specifically, a number of hiring officials at the Pontiac Truck plant testified that Gordon Campbell and Fante were unqualified, neither of these individuals would have

been otherwise considered for skilled trades jobs, and neither would have been entitled to these positions under hiring procedure guidelines even if they were qualified. Evidence also existed that Defendants conspired to demand that Gordon Campbell and Fante be given these positions. All of these pieces of evidence provide adequate support for the jury's verdict, and preclude this Court from reversing the judgment on these grounds.

3. Sufficient evidence exists to support the jury verdict that Defendants knew the objective of their actions was wrongful

Merely proving that Defendants actions were wrongful is insufficient to support a conviction here, as the government must show that Defendants' objective was contrary to legitimate union objectives. *U.S. v. Enmons,* 410 U.S. 396, 410, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). Defendants attempt to distinguish the facts of this case from two prior Sixth Circuit cases that found the conduct of union representatives to be wrongful because the conduct at issue violated current labor agreements. *See U.S. v. Cusmano,* 729 F.2d 380 (6th Cir.1984); and *U.S. v. Russo,* 708 F.2d 209 (6th Cir.1983). These arguments are unavailing, as that court already determined that Defendants' alleged actions here, if proven, were contrary to the existing agreement and UAW Constitution. *Douglas,* 398 F.3d at 415. At trial, testimony of hiring officials at General Motors established that

they told Defendants that Gordon Campbell and Fante were not qualified for or entitled to these jobs, which would support the conclusion that Defendants knew they were pursuing a wrongful objective. Furthermore, the law does not require that the persons doing the extorting actually obtain property themselves in order to be found guilty. *U.S. v. Green,* 350 U.S. 415, 420, 76 S.Ct. 522, 100 L.Ed. 494 (1956). Therefore, Defendants are not entitled to a judgment of acquittal on these grounds, and their motion on this point is DENIED.

B. Defendants are not Entitled to a New Trial Under Rule 33

Defendants argue that several errors in the jury instructions support their motion for a new trial. Their arguments regarding Instructions 30, 31, 39 and 41 were already addressed above, and need not be considered further here.

1. Standard of Review

Federal Rule of Criminal Procedure 33(a) permits the Court to "vacate any judgment and grant a new trial if the interest of justice so requires." "Unless a motion for a new trial is based on newly discovered evidence, it must be filed within seven days of the verdict or within such further time as the court may fix during that seven-day period." *United States v. Koehler,* 24 F.3d 867, 869 (6th Cir.1994) (citing Fed. R. Crim P. 33(b)). "If the motion is untimely, the court

lacks jurisdiction to consider it on the merits." *Id.* Here, the Court granted Defendants' request for more time to file their post-trial motions and thus it has jurisdiction to consider a Rule 33 motion on the merits.

2. Defendants' alleged instructional errors are without merit

First, Defendants argue that Instruction 29 was in error because it stated that they did not need to know that their conduct was illegal to be found guilty. The Sixth Circuit does not require this degree of knowledge, however. All that is required is that Defendants knew what they were doing. *U.S. v. Carter,* 311 F.2d 934, 943 (6th Cir.1963).

Next, Defendants argue that Instruction 38 improperly focused on the wrongfulness of Defendants' *acts,* as opposed to the proper inquiry, which is the wrongfulness of Defendants' *objectives.* The instruction as given accorded with standard pattern jury instructions, O'Malley et al., *Federal Jury Practice and Instructions* § 53.07 (5th ed.2005), and Instruction 41 properly instructed the jury that its attention was properly focused on Defendants' objectives, so this argument is without merit.

Defendants also object to the exclusion of language from Instruction 40 that would have specifically noted that "the use of work stoppages, strikes or threats of strikes, is commonplace in union-management bargaining." (Defs.' Rule 33 Mot. for

New Trial, ¶ 6.) Defendants cite no authority for the proposition that such language is required,[1] and this Court does not see how the instruction as given warrants a new trial without any legal support.

Finally, Defendants assert that the alleged conduct could not be wrongful unless the jobs obtained were "imposed, unwanted, superfluous [or] fictitious services." *Green,* 350 U.S. at 417. As the government points out, however, the quoted language from *Green* indicated an example of wrongful conduct, but did not serve to circumscribe other types of conduct from the definition.

For all the above reasons, Defendants are not entitled to a new trial under Rule 33 for improper jury instructions, so this motion is DENIED.

C. Defendants are not Entitled to a New Trial Under *Brady v. Maryland*

Defendants' next argument is that the government's failure to disclose a prior state felony conviction by one of the government's witnesses, and subsequent grant of non-disqualification to this individual, violated Defendants' rights under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* requires the disclosure of material

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[1] Defendants do cite to a concurring opinion in *Cusmano,* 729 F.2d 380, but the Court's review indicates that no concurring opinion was filed in that case.

evidence that is favorable to the accused in a criminal trial, but that case was not designed to grant broad discovery rights to criminal defendants. *U.S. v. Todd,* 920 F.2d 399, 405 (6th Cir.1990) (citing *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30, (1977)). The government violates a defendant's rights under *Brady* when (1) "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching," (2) "[the] evidence [was] suppressed by the State," and (3) "prejudice . . . ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The particular witness at issue, Mark Hawkins, was a union official who pled guilty in 1988 to a state law offense for attempted receiving and concealing stolen property over $100 for his conduct in selling a stolen speedboat worth up to $10,000 to another union member. In 1990, Hawkins received relief from disqualification from the U.S. Justice Department's Organized Crime and Racketeering Section Criminal Division, which allowed him to maintain his union official position following the guilty plea. Defendants claim that the government violated their rights under *Brady* by failing to disclose Hawkins' conviction as well as the relief from disqualification, claiming that this would have provided them adequate information with which to impeach his testimony at trial.

Although Defendants' ability to establish each of the three *Stricker* [sic] elements is suspect, the bottom line issue with Hawkins' conviction is the fact that it is immaterial to the present action, if it would even be

admissible under Rule 609 of the Federal Rules of Evidence. His guilty plea occurred eighteen years before trial occurred in this case, and at least eight years prior to Defendants' conduct in 1996 and 1997 that is the subject of the instant case. Furthermore, Hawkins' testimony at trial consisted primarily of general background information on union matters, and any statements he made regarding Defendants' actions were corroborated by other witnesses. This Court is not convinced that Defendants' use of the undisclosed information would have sufficiently impeached Hawkins' testimony, so Defendants have not shown that they were prejudiced by the government's failure to disclose Hawkins' past conviction. Therefore, Defendants' motion for a new trial on these grounds is DENIED.

D. Defendants are not Entitled to an Arrest of Judgment Under Rule 34

Defendants' final ground for a new trial requests this Court to arrest the judgment because the indictment did not charge an offense, as Defendants did not receive a "thing of value" under 29 U.S.C. § 186. A motion to arrest judgment under Rule 34 must be granted if substantive defects exist in the indictment or information, such that an offense is not charged, or if the court lacked jurisdiction over the case. "Motions for this relief are rarely made, and it is even rarer that they are granted." 3 Charles Alan Wright, et al., Federal Practice and Procedure, § 571 (3rd ed.2004).

Defendants' latest argument mirrors that which this Court already rejected above in their motion for a judgment of acquittal under Rule 29(c), so Defendants' motion is accordingly DENIED here as well.

III. SUMMARY

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

Defendants' motions (1) for judgment of acquittal under Rule 29(c), (2) for a new trial under Rule 33, (3) for a new trial under *Brady v. Maryland,* and (4) for arrest of judgment under Rule 34 are all DENIED.

SO ORDERED.

2006 WL 897436 (E.D.Mich.)

United States District Court,
E.D. Michigan, Southern Division.

UNITED STATES OF AMERICA, Plaintiff,
v.
Jay CAMPBELL and Donny Douglas, Defendants.

No. 02-80863.
April 6, 2006.

James M. Wouczyna, Vincent Falvo, U.S. Attorney's Office, Detroit, MI, for Plaintiff.

Peter J. Kelley, Ann Arbor, MI, for Defendants.

ORDER:

EDMUNDS, J.

1) Denying Defendants' Motion to Dismiss Pursuant to Rule 12(b)

2) Denying Defendants' Motion to Preclude Reliance and Strike Allegations of Conspiracy Objects in Paragraphs 3 and 4 of Count One of the Indictment and to Dismiss Count One of the Indictment

3) Denying Defendants' Motion to Strike Surplusage from Count Three of the Indictment

4) Denying Defendants' Motion in Limine Regarding Statements and Documents of Co-Conspirator, William Coffey

5) Granting Government's Motion in Limine to Preclude Defendants' Reliance upon the Decision

of the UAW's Public Review Board Dated October 25, 2004

In its three-count Indictment, the Government alleges that during contract negotiations between the United Auto Workers ("UAW") and General Motors ("GM"), Defendants improperly demanded skilled trade jobs for two unqualified individuals, Gordon Campbell and Todd Fante. Gordon Campbell is the son of Defendant Jay Campbell, and Fante is the son in law of another former UAW official. The Government alleges that Defendants' insistence on the hiring of Campbell and Fante took place throughout labor negotiations and throughout a strike at GM's Pontiac truck facility. Campbell and Fante were eventually hired into the skilled trade positions, and the strike ended after eighty-seven days. Before the Court are several pretrial motions, which are addressed in turn below.

I. Defendants' Motion to Dismiss Pursuant to Rule 12(b)

As Defendants point out, each of the three counts of the Indictment requires the Government to prove that the individuals for whom Defendants allegedly secured "skilled trades" jobs are unqualified for those positions. If the Government fails to convince a jury of the individuals' qualifications, Defendants cannot be found guilty of the charged offenses. Defendants argue, however, that a jury is not even necessary, and that the employees in question can be shown to have

been qualified *as a matter of law.* Defendants' argument is unpersuasive.

Defendants rely on three pieces of evidence. First, on October 25, 2004, the UAW Public Review Board ("PRB") issued an opinion addressing whether "improper considerations influenced the General Motors Department's decision not to remand the reinstatement of their grievances challenging the credentials of two new hires into their skilled-trades classifications." (Br. of Defs. Ex. F2 at 1.) In finding that the GM Department's decision was not influenced by improper considerations, the PRB also made several findings about the qualifications of the two employees at issue, Gordon Campbell and Todd Fante. The PRB stated, for example, that "[t]here is nothing in the record of this appeal to support [the] contention that Campbell and Fante lacked the qualifications to be hired into a skilled-trades classification. . . ." (*Id.* at 12.)

Second, on September 22, 1999, the National Labor Relations Board ("NLRB") refused to issue a complaint against the UAW where "Jay Campbell, Chairman of Shop Committee, and another Union official benefitted from this provision regarding new hires, by virtue of their relatives being hired, the Union violated its duty of fair representation." (Br. of Def. Ex. C at 1.) After holding that the allegation was untimely filed, the NLRB stated that its investigation failed to establish that the UAW violated its duty of fair representation:

> Part of the Union's proposal, agreed upon by management, included a provision that 2 of the 31 additional manpower openings would be new hires. The ratification vote was passed by a total of 94% of the members voting. The new persons hired after ratification are not classified as [Employees in Training], Journeymen or Apprentices and appear to be relatives or friends of the Local 594 bargaining team. However, the failure to disclose this aspect of the manpower provisions does not establish that the ratification vote would have been substantially different given the overwhelming vote in favor of ratification.

(*Id.* Ex. D at 3-4.)

Finally, on August 5, 2005, the Sixth Circuit Court of Appeals affirmed a district court's grant of summary judgment in a civil case addressing the transaction at issue here. The plaintiffs in *Garrish v. UAW*, 417 F.3d 590 (6th Cir.2005), sued under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of contract and breach of the duty of fair representation, seeking "the removal of Gordon Campbell and Fante from their skilled trade positions, as well as compensatory damages in lost wages for 5,000 employees during the prolonged strike and punitive damages from all defendants." *Id.* at 593. The Sixth Circuit opinion primarily addresses whether the plaintiffs' claims were time-barred, ultimately finding in favor of the defendants and refusing to allow the claims to go forward. But a

paragraph at the end of the court's opinion briefly touches upon the merits of the case:

> Neither the prolongation of a strike nor the payoffs constitutes a cause of action in the instant appeal. . . . Although the hiring of unqualified employees is a viable claim under § 301, the only available remedy here would be that which Plaintiffs sought in their grievances. However, this claim is time barred.

Id. at 598 (internal citations omitted).

Contrary to Defendants' argument, none of these authorities establishes conclusively that Gordon Campbell and Todd Fante were qualified for skilled trade positions. More importantly, these authorities cannot establish this issue as a matter of law.

Federal Rule of Criminal Procedure 12(b)(2), upon which Defendants rely, provides that a "party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue."

> Generally, motions are capable of determination before trial if they raise questions of law rather than fact. However, . . . a district court may make preliminary findings of fact necessary to decide the questions of law presented by pre-trial motion so long as the court's findings on the motion do not invade the province of the ultimate finder of fact. Thus, a defense is "'capable of determination' if trial of the facts surrounding the

> commission of the alleged offense would be of no assistance in determining the validity of the defense."

United States v. Jones, 542 F.2d 661, 664-665 (6th Cir.1976) (quoting *United States v. Covington,* 395 U.S. 57, 60, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969)) (some internal citations omitted). On a motion to dismiss, the Court must view the Indictment's factual allegations as true, and must determine only whether the Indictment is "valid on its face." *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

Defendants have advanced no reason why the indictment is legally invalid on its face. To hold that Defendants were qualified for the skilled trade jobs would invade the province of the jury, and would do so in furtherance of no separate preliminary question of law. Perhaps the facts will support their argument at trial, but this Court is not the judge of that.[1]

Because Campbell's Fante's [sic] job qualifications are not questions of law for this court, the Court DENIES Defendants' Motion to Dismiss Pursuant to Rule 12(b).

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[1] Defendants state that the Court "*may* dismiss the Indictment" (Br. of Defs. at 9), and that the Court "*has the authority* to dismiss an indictment as a matter of law before trial based upon defenses or insufficiency of evidence. . . ." (Repl. Br. of Defs. at 2.) Even if the Court could dismiss the indictment based on insufficiency of the evidence, the Court would decline to do so. Defendant's evidence does not support such a finding.

II. Defendants' Motion to Preclude Reliance and Strike Allegations of Conspiracy Objects in Paragraphs 3 and 4 of Count One of the Indictment and to Dismiss Count One of the Indictment

At issue in this Motion are Paragraphs 3 and 4 of Count One of the Indictment, which fall under the heading, "THE OBJECTS OF THE CONSPIRACY." Both Paragraphs begin, "It was an object of the conspiracy that Defendants . . . would unlawfully and willingly request, demand, receive and accept, and agree to accept, the payment, loan, and delivery of things in value in excess of $1,000 from GM, to wit:. . . ." The Paragraphs then specify the two objects of the conspiracy, respectively, as "the authority to amend the terms of the National Agreements between GM and the UAW," and "the skilled trades and/or journeyman designation . . . and employment under that designation with associated wages and benefits for Gordon Campbell and Todd Fante. . . ." (Indictment at 3-4.)

On October 21, 2003, this Court Dismissed the Indictment. As to Count I, the Court stated, "in order to violate these sections, Defendants must have conspired to demand some 'thing of value."' *United States v. Campbell*, 291 F.Supp.2d 547, 551 (E.D.Mich.2003). The Court then found that neither of the alleged objects of the conspiracy were actually "things of value" to Defendants, therefore defeating Count One of the Indictment. *Id.* at 551-53.

The Government appealed. The Sixth Circuit described this Court's reasoning as follows:

> [T]he district court [found] that neither the authority to amend the National Agreement nor the procurement of jobs for third parties qualifies as a thing of value under the statute. The district court reasoned that because defendants did not conspire for "things of value," they did not engage in the acts prohibited by either section of the Act. The court concluded that absent an allegation that defendants violated the substantive statute, they necessarily could not have violated section 371, and, thus, the indictment did not allege a criminal offense.

United States v. Douglas, 398 F.3d 407, 412 (6th Cir.2005). The court declined to decide whether this Court was correct in holding that the alleged objects of the conspiracy were not "things of value." *Id.* at 412 n. 1.[2] It held only that because the Indictment "need not include reference to 'things of value,"' it was error for this Court even to ask the question. *Id.* The

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[2] The Sixth Circuit noted, "The United States has elected not to appeal the district court's finding that the employment and authority to amend were not 'things of value."' 398 F.3d 412 n. 1. The Government vigorously argues that the Sixth Circuit has entirely misunderstood its position, pointing out that it has indeed contested this Court's determination that the alleged objects of the conspiracy were not in fact things of value. Indeed, the Government filed a Motion in the Sixth Circuit asking that court to "delete footnote one of its opinion or modify it to eliminate the misstatement that the Government elected not to appeal the district court's legal conclusion and factual finding that the employment was not a 'thing of value."' (Br. of Defs. Ex. A at 4.)

Government aptly describes the Sixth Circuit's reasoning: "The panel found that a minimally sufficient indictment for conspiracy under section 371 need not provide all the specific elements of the offense to be violated. In other words, the Government alleged a conspiracy in Count One providing more detail than necessary, but a sufficient conspiracy all the same. . . ." (Br. of Gov't at 5.)

Defendants make two arguments. First, they argue that because the Sixth Circuit did not explicitly reverse this Court's finding that the two alleged objects of the conspiracy were insufficient as a matter of law, this Court should strike Paragraphs 3 and 4 from the Indictment. This argument rests on the Sixth Circuit's finding that the Indictment is sufficient without Paragraphs 3 and 4, and at the same time, decision not to reverse this Court's ruling that Paragraphs 3 and 4 are insufficient to constitute objects of the conspiracy. Defendants rely on the law of the case doctrine, which, "[a]s most commonly defined, . . . posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (quoting *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). Because this Court's holding as to Paragraphs 3 and 4 has not been disturbed, Defendants argue, it should remain the "law of the case."

Defendants' second argument rests on the Fifth Amendment Right to a grand jury indictment:

> If this Court is now to adopt the Court of Appeals, as it must, the allegations in Count One can only be taken as general and not limited to an agreement to obtain specific things of value. Based on the Court of Appeals decision, Count One can only be taken to charge an offense plainly broader than the one alleged by the grand jury.
>
> (Br. of Defs. at 11.)

Each of these arguments is compelling, and they highlight what might be – as both Defendants and the Government point out – a shortcoming of the Sixth Circuit's opinion in this case. By addressing only the preliminary issue of whether the Government needed to allege the particular objects of Defendants' conspiracy, the Sixth Circuit sidestepped a more salient issue: "Given that the Government has alleged two particular 'objects of the conspiracy,' are those objects sufficient as a matter of law?" Unfortunately, the Sixth Circuit provided no guidance to the parties or to this Court in resolving the issue.

The problem with Defendants' argument is that it assumes, and asks this Court to assume, that if the Sixth Circuit had addressed the entirety of the issue, it would have reached the opposite result. In other words, had the Sixth Circuit ruled as Defendants are now asking this Court to rule, it would have upheld

this Court's dismissal of Count One of the Indictment on alternate grounds.

This Court appreciates the logic of Defendants' argument. Nevertheless, the Court is compelled to assume that the Sixth Circuit has implicitly overruled this Court's holding that the alleged objects of the conspiracy are insufficient as a matter of law. The Court therefore reverses its earlier holding that Paragraphs 3 and 4 of the Indictment do not describe "things of value," and declines to strike those Paragraphs from the Indictment. The Court holds, in accordance with the Sixth Circuit's implicit directions, that Paragraphs 3 and 4 are legally sufficient to support convictions in this case.

Because the Sixth Circuit has held that Count One of the Indictment is sufficient as alleged to support a conviction, the Court DENIES Defendants' Motion to Preclude Reliance and Strike Allegations of Conspiracy Objects in Paragraphs 3 and 4 of Count One of the Indictment and to Dismiss Count One of the Indictment.

III. Defendants' Motion to Strike Surplusage from Count Three of the Indictment

In this Motion, Defendants raise a similar argument as discussed immediately above. Count III of the indictment charges Defendants with defrauding UAW members of three things, one of which is defined in the Indictment as "the honest services of the Defendants, which they owed to Local 594 members

pursuant to Article 19 of the UAW Constitution, Section 501(a) of the [Labor Management Reporting and Disclosure Act ("LMRDA")], and the defendants' duty to faithfully and fairly represent the members of Local 594 as labor representatives." (Indictment at 12.)

In its October 21, 2003 dismissal of the Indictment, this Court held that the Indictment was "insufficient to establish the third element of a breach of honest services allegation, that is Defendants should have reasonably foreseen that the breach would create an economic risk to the membership of Local 594." 291 F.Supp.2d at 557. The Court went on to note that the Government's allegations of "honest services" fraud "are essentially allegations of unfair labor practices, which should not result in criminal liability." *Id.* The Court relied on *United States v. Boffa*, 688 F.2d 919 (3d Cir.1982), in which the Third Circuit found that "[t]o permit mail fraud prosecutions grounded on unfair labor practices would be to impose criminal penalties for conduct that, until now, has been remediable solely under the NLRA." *Id.* at 928. Finally, the Court found that Defendants' alleged violation of "their duty to faithfully and fairly represent the members" should not result in criminal liability. *Id.*

In the Sixth Circuit opinion reversing this Court's dismissal of the Indictment, the court held that the element that this Court had found to be missing from the Indictment – that Defendants should have "reasonably foreseen that the breach

would create an economic risk" – was actually not an essential element to the Indictment, and its absence was therefore not fatal to the Government's case.

The Sixth Circuit agreed with *Boffa*'s proposition that "while deprivation of rights guaranteed by the [NLRA] may . . . be vindicated solely through that Act's procedures for unfair labor practice disputes, schemes to deprive an individual of economic benefits that are contained in a collective bargaining agreement are subject to the criminal sanctions set forth in the mail fraud statute." 398 F.3d at 417 (citing *Boffa*, 688 F.2d at 930). Nevertheless, the court appears to have been satisfied with the Indictment: "The government accurately states the elements of the honest services charge. The indictment has only to allege that defendants devised a scheme to defraud, involving use of the mails for the purpose of executing the scheme. The indictment sufficiently makes these allegations." *Id.* at 419.

Defendants contend that "the Sixth Circuit Opinion in this case agrees with *Boffa*'s analysis of duty of fair representation and with *Boffa*'s distinction between schemes intended to deprive employees by 'unfair labor practices related to the [NLRA],' and schemes focused on deprivation of economic benefits." (Repl. Br. of Defs. at 2 (citation omitted).) The Sixth Circuit did not expressly disagree with this Court's finding that the unfair labor practices charges did not support the indictment. Thus, Defendants argue, based on the "law of the case doctrine," this Court should reaffirm its earlier holding as to that issue,

and should "conclude that the Count Three 'duty of fair representation' allegations have no legal validity."' (Br. of Defs. At 3.)

For the same reasons as the Court has discussed in the previous section, it declines to reaffirm its earlier holding. While the Sixth Circuit did not rule on this discrete issue, it was very clearly satisfied with the Indictment as alleged. The Sixth Circuit was competent to address the issue, and spent a good deal of time discussing the "honest services" charges. This Court assumes that if the Sixth Circuit had agreed with this Court's holding as to the present issue, it would have said so. Because, pursuant to the Sixth Circuit opinion, the Government has accurately pled the "honest services" charge, this Court DENIES Defendants' Motion to Strike Surplusage from Count Three of the Indictment.

IV. Defendants' Motion in Limine Regarding Statements and Documents of Co-Conspirator, William Coffey

The indictment in this case names three defendants, Jay Campbell, Donny Douglas, and William Coffey, all of whom are alleged to have been involved in the same conspiracy. Coffey died in 2004. Prior to his death, however, Coffey made a number of written and oral statements about this case. The Government will seek to introduce many of these statements against Defendants at trail.

Defendants describe this Motion in Limine as follows:

> Defendant[s] acknowledge[ ] that hearsay statements of a deceased coconspirator [sic] may be admissible under a number of exceptions to the hearsay rule pursuant to the Federal Rules of Evidence. Defendant[s] simply request [ ] that the statements and documents made by Mr. Coffey over the period of August, 1994 through August 4, that the government intends to introduce . . . be identified in advance of trial or be precluded from evidence. Hearings must be held to determine the admissibility of these hearsay statements and documents containing statements purportedly made by Mr. Coffey at a reasonable time before trial.
>
> (Repl. Br. of Def. at 1-2.)

Defendants do not cite a single basis for exclusion of Coffey's statements. Rather, they appear simply to ask for a "heads-up," so that they can prepare for trial and so that trial can move forward without unnecessary waste of time.

Given that Defendants have provided no reason that some of Coffey's statements might be excluded, the Court sees no danger for an unnecessary waste of time. Of course, any inadmissible hearsay statements of William Coffey will be excluded at trial, but the Court is comfortable addressing each objection as it arises in the context of trail. The Court therefore DENIES without prejudice Defendants' Motion in

Limine Regarding Statements and Documents of Co-Conspirator, William Coffey.

V. Government's Motion in Limine to Preclude Defendants' Reliance upon the Decision of the UAW's Public Review Board Dated October 25, 2004

The Government moves to exclude evidence of an internal UAW decision favorable to Defendants' position in this case. Specifically, Defendants seek to introduce evidence of the UAW's Public Review Board Decision of October 25, 2004, finding, among other things, that "[t]here is nothing in the record of this appeal to support [the] contention that Campbell and Fante lacked the qualifications to be hired into a skilled-trades classification. . . ." *See supra* Section I.

Although the facts are somewhat complex, and the briefing is extensive, this Motion requires a simple Rule 403 balancing test. The Court finds that evidence is of limited probative value, since the standards of review, evidentiary rules, and other procedural considerations are different in an internal union proceeding. Moreover, the evidence has the potential for extreme unfair prejudice, since a jury may tend to defer to the Union's findings, rather than to make its own conclusions of fact. Finally, Defendants' cases do very little to support their position; at most they stand for the proposition that the Court has discretion to allow evidence of prior union proceedings for limited purposes. Therefore, the Court GRANTS the Government's Motion in Limine to

Preclude Defendants' Reliance upon the Decision of the UAW's Public Review Board Dated October 25, 2004.

VI. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above and on the record, the Court hereby DENIES each of the Defendants' Motions and GRANTS the Government's Motion.

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291 F.Supp.2d 547

United States District Court, E.D. Michigan.
Southern Division.

UNITED STATES of America, Plaintiff,
v.
Jay CAMPBELL and
Donny Douglas, Defendants.

No. 02-80863.
Oct. 21, 2003.

Peter J. Kelley, Ann Arbor, MI, Laurence C. Burgess, Detroit, MI, Harold Z. Gurewitz, Southfield, MI, Harold Z. Gurewitz, Gurewitz & Raben, Detroit, MI, for Defendants.

ORDER AND OPINION GRANTING DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

EDMUNDS, District Judge.

This matter came before the Court on Defendants' motion to dismiss the three-count indictment against them. Defendants, union officials, are charged with violating various criminal statutes arising out of their actions during labor negotiations with the General Motors' truck plant in Pontiac, Michigan. The indictment fails to allege criminal offenses against the United States, and therefore Defendants' motion is GRANTED.

I. Facts

A. The Agreements

United Auto Workers ("UAW") Local 594 represents over 5,000 production and skilled trades employees at General Motors' Pontiac truck facilities ("Pontiac Truck"). The National Agreement between General Motors and the International UAW, as well as the Local Agreement between Pontiac Truck and Local 594, determine the terms of employment for Pontiac Truck employees. After General Motors and the International UAW execute the National Agreement, the management of Pontiac Truck and Local 594 officials negotiate the Local Agreement. The local negotiators on both sides do not have the authority to amend or alter the terms of the National Agreement. Additionally, the UAW Constitution states that no official or member "shall have the power or authority to counsel, cause, initiate, participate in, or ratify any action which constitutes a breach of any contract entered into by a Local Union or by the International Union or by a subordinate body thereof."

B. Skilled Trades Positions

The National Agreement provides that employees may receive the designation of "skilled tradesman" and bid upon various "skilled trade positions." The positions pay in excess of $100,000 per year. The National Agreement provides various education and training requirements for skilled tradesman [sic]. Many General Motors employees meet these requirements,

but have not yet received a skilled trades position. The National Agreement and a Memorandum of Understanding between General Motors and the International UAW specify the hiring preference system at Pontiac Truck when skilled positions become available. That hierarchy begins with laid-off skilled trades employees, and continues through current General Motors employees who are qualified under the National Agreement, other current General Motors employees, and so forth. Outside applicants who do not meet the requirements in the National Agreement are accorded no preference.

C. Defendants' Alleged Actions

From 1995 to 1997, Defendants served as officials of Local 594 and were its chief negotiators with Pontiac Truck over several local agreements and memoranda. During that period, the government alleges that Defendants demanded that Pontiac Truck hire Gordon Campbell, son of Defendant Jay Campbell, and Todd Fante, nephew and son-in-law of former Local 594 officials, into skilled trade positions. Neither Campbell nor Fante were employees of Pontiac Truck or General Motors, and neither were qualified under the National Agreement to be skilled tradesmen. General Motors and UAW officials refused the demand and informed Defendants that Campbell and Fante were not qualified for the positions and that hiring them into the positions would violate the National Agreement and Memorandum of Understanding.

In 1996, General Motors and the International UAW reached a new three-year National Agreement. Local 594 and Pontiac Truck then began negotiations for their local agreement. The government alleges that Defendants again demanded that Pontiac Truck hire Campbell and Fante as skilled tradesmen.

In April 1997, Local 594 began a strike at Pontiac Truck. The government contends that by July 1997, all the issues of the strike had been settled except for the demand that Pontiac Truck hire Campbell and Fante. The government further contends that to avoid the continuation of the strike, General Motors agreed to hire Campbell and Fante into skilled trade positions.

The government also alleges that during the ratification of the new contract, Defendants actively concealed General Motors' promise to hire Campbell and Fante from Local 594 membership. Furthermore, the government alleges that Defendants actively concealed that Fante and Campbell were not qualified for the positions from Local 594 membership, and Defendants dismissed grievances by Local 594 members complaining of the hiring of Campbell and Fante, grievances which Defendants knew had merit.

On September 25, 2002, Defendants were indicted in a three-count indictment.[1] Count One alleges

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[1] William Coffey was also indicted, but the charges were later dismissed after he passed away.

that Defendants violated 18 U.S.C. § 371 – conspiring to violate the Labor-Management Relations Act. The indictment identifies the objects of the conspiracy as (1) the authority to amend the terms of the National Agreements, the Addenda, and Memoranda of Understanding; and (2) the employment and skilled trades designation for Gordon Campbell and Todd Fante. Count Two alleges that Defendants violated 18 U.S.C. § 1951 – conspiracy to extort. The objects of the conspiracy were jobs for Fante and Campbell. Count Three alleges that Defendants violated 18 U.S.C. §§ 1341, 1346 and 2 [sic] – mail fraud and aiding and abetting. Count Three alleges that Defendants used a scheme and artifice to defraud members of Local 594 of their contractual right to obtain skilled trades positions and the honest services of Defendants.

II. Analysis

Defendants move to dismiss all counts of the indictment for two reasons: the indictment fails to allege offenses and it is preempted by federal labor law. The Court finds the indictment does not allege offenses against the United States and should therefore be dismissed. Accordingly, the Court need not reach the preemption issue.[2]

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[2] The Court notes, however, that the weight of authority is against a finding of preemption in this case. *See United States v. Boffa*, 688 F.2d 919 (3rd Cir.1982) (holding that *Garmon* preemption does not apply to conflicts between federal labor

(Continued on following page)

At the outset, the Court notes that the rule of lenity appropriately colors the following analysis. The doctrine of lenity sets boundaries prohibiting the expansion of criminal statutes by means of defining essential terms or elements of wrongful conduct to include "constructive" offenses or offenses clearly not intended by Congress. A criminal statute must be strictly construed, *U.S. v. Emmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), and constructive offenses should be avoided, *McNally v. U.S.*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). In this case, the indictment is only sufficient if the Court were to create numerous constructive offenses.

A. Count One

Count One of the indictment charges Defendants with conspiring to commit offenses against the United States in violation of 18 U.S.C. § 371, which makes criminal a conspiracy to commit a crime against the United States or to defraud the United States. Count

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laws and other federal laws); *Smith v. National Steel & Shipbuilding Co.*, 125 F.3d 751 (9th Cir.1997) (same); *United States v. International Brotherhood of Teamsters*, 948 F.2d 98, 105 (2d Cir.1991) (same); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 862 (7th Cir.1998) (holding that *Garmon* does not apply to federal criminal statutes); *Hospital Employees' Div. of Local 79 v. Mercy-Memorial Hospital*, 862 F.2d 606, 607-608 (6th Cir.1988), *vac'd on other grounds*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989) (holding that violations of § 186 of the Taft-Hartley Act are intended to supplement the NLRA, and not be preempted by it).

One identifies 29 U.S.C. § 186(a)(1), § 186(b)(1), and § 186(d)(2) as the specific offense Defendants conspired to commit. Section 186(a) provides that "it shall be unlawful for an employer to pay or deliver, or to agree to pay or deliver any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." Section 186(b)(1) makes it unlawful "for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by subsection (a) of this section." Thus, in order to violate these sections, Defendants must have conspired to demand some "thing of value." Defendants argue that neither the authority to amend the National Agreement nor the procurement of jobs for third parties are things of value under the statute.

1. The Authority to Amend the National Agreement

Count One alleges that one object of the conspiracy was to demand and receive, or to agree to demand and receive, "a thing of value," alleged to be "the authority to amend the terms of the National Agreements between GM and the UAW." Defendants contend that such authority is merely illusory because under no circumstances could Defendants exercise the authority. The National Agreement, as well as the UAW Constitution, prohibit local representatives from attempting to amend a National Agreement. Moreover, the UAW Constitution, Article 19 prohibits

representatives of any local union from causing any breach of contract. Therefore, Defendants conclude that any purported amendment by a local union of the National Agreement would be unenforceable, and even if the authority could be obtained from General Motors in contravention of the National Agreement, the result would be a breach and a violation of the contract. Hence, Defendants contend that the grant of authority to amend the National Agreement was invalid and unenforceable, and such an agreement cannot be a "thing of value." The government admits that once the National Agreement has been executed, Defendants as negotiators for Local 594 may not deviate, renegotiate, or amend in any way. (Resp. Br. at 13.)

In deciding what "things of value" are in criminal statutes, courts include intangibles. *United States v. Schwartz,* 785 F.2d 673, 680 (9th Cir.1986). Nevertheless, even an intangible must have some value, and an agreement which could never be acted upon is not valuable to anyone. Therefore, the agreement to amend the National Agreement is not a thing of value.

2. The Jobs

Defendants also argue that § 186's prohibition against "payment, loan, and delivery of money and things of value" did not prohibit Pontiac Truck from hiring Campbell and Fante as skilled tradesman [sic] for two reasons: (1) the statute does not prevent an

employer from delivering or agreeing to deliver a thing of value to third parties, and (2) 29 U.S.C. § 186(c)(1) provides an exception that allows employers to provide compensation, i.e. wages, for actual services rendered.

Defendants' argue that the statute does not prohibit the delivery of things of value to third parties. 29 U.S.C. § 186(a) prohibits the an employer from paying or agreeing to pay any money or thing of value to (1) any representative of his employees; (2) any labor organizations or its officers; (3) any employee with the purpose of influencing other employees' right to collectively bargain. 29 U.S.C. § 186(b) makes it unlawful for any person to request, receive, or accept any payment prohibited by subsection (a). The plain language of the statute makes clear that the recipient of the money or thing of value must be Defendants.

The government points out that the Fourth Circuit has allowed payments to third parties to constitute the basis of a § 186 conviction based on the fiction that the "thing of value" was the demand and agreement that the employer pay the third party, and the defendant did receive that thing of value even if he did not receive the monetary payments. *United States v. DeBrouse,* 652 F.2d 383, 388 (4th Cir.1981). Despite the government's desire for this Court to separate the agreement from the payments in this case, the essence of this part of Count One is the allegation that General Motors paid a thing of value (wages) to Fante and Campbell, not Defendants.

Defendants may not be liable for a violation of § 186 for the delivery of things of value to third parties when the statute only prohibits an employer from delivering a thing of value to a representative of his employees. Moreover, in *DeBrouse,* the defendants demanded payments for "ghost" employees, employees the employer did not want and whom did not provide any services in exchange for wages. The defendants simply demanded that payoffs be made to the "ghost" employees instead of themselves. Here, by contrast, the indictment does not allege that Pontiac Truck did not receive the services for which it paid Fante and Campbell. This difference between actual and "ghost" employees strengthens the conclusion that Defendants should not be liable for payments to Campbell and Fante. They were actual employees paid for their services by General Motors, not merely persons to whom General Motors made personal payoff payments instead of to Defendants. Therefore, Count One is dismissed.

B. Count Two

Count Two charges Defendants with unlawfully conspiring to obstruct, delay and affect commerce in violation of 18 U.S.C. § 1951 ("the Hobbs Act") through extortion, having obtained employment wages and benefits for Gordon Campbell and Todd Fante by Inducing General Motors through the wrongful use of fear of economic harm. Count Two fails because it does not allege an illegitimate objective.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear. . . ." 18 U.S.C. § 1951(b)(2). *United States v. Enmons,* 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973) largely controls the disposition of this issue. In *Enmons,* the defendants were members and officials of a labor union who were charged with the use of actual force, violence, and fear of economic injury in order to force a company to agree to a contract with the union, which called for higher wages and other monetary benefits. *Id.* at 397, 93 S.Ct. 1007. The defendants were charged with committing five acts of physical violence in order to coerce the company to sign the contract. *Id.* at 398, 93 S.Ct. 1007. The lower court dismissed the indictment because the defendants' alleged use of force was to obtain legitimate union objectives, and the government appealed to the Supreme Court.[3] *Id.* The Court decided that the Hobbs Act is limited

> to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property. Construed in this fashion, the Hobbs Act has properly been held to reach instances where union officials threatened force or violence against an employer in order to obtain personal payoff, and where

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[3] The procedural rules in effect at the time permitted a direct appeal to the Supreme Court.

> unions used the proscribed means to exact 'wage' payments from employers in return for 'imposed, unwanted, superfluous and fictitious services' of workers.
>
> *Id.* at 400, 93 S.Ct. 1007. The Court held that when force is used to obtain legitimate union demands, such as higher wages, the Hobbs Act does not apply. *Id.* at 410, 93 S.Ct. 1007.

Generally, negotiating for additional jobs is a legitimate labor objective. 29 U.S.C. § 158(b)(6) makes it an unfair labor practice only to cause an employer to pay a thing of value "for services which are not performed or not to be performed," implying that it is not necessarily an unfair labor practice to cause an employer to pay for services which were actually performed or intended to be performed. Indeed, the Supreme Court has decided that § 158(b)(6) does not prevent a union from negotiating for positions that are arguably unneeded by the employer in order to create more jobs for union members: "Where the work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent doing the disputed work does not become an unfair labor practice." *Am. Newspaper Ass'n v. NLRB,* 345 U.S. 100, 110, 73 S.Ct. 552, 97 L.Ed. 852 (1953). Thus, Defendants' bargaining demand for additional skilled trades positions, even if otherwise unwanted by General Motors, is not an illegitimate bargaining objective and falls within the *Enmons* exception.

The government contends that while generally this may be true, in this case the additional positions for Campbell and Fante violated the then existing contracts between General Motors and Local 594, and therefore the objective was unlawful. The government cites two Sixth Circuit decisions for the proposition that bargaining demands that violate the National Agreement, the Memorandum of Understanding, and the UAW Constitution are wrongful and do not fall under the *Enmons* exception.

In *United States v. Russo,* 708 F.2d 209 (6th Cir.1983), the defendants were employers who, by threats of economic loss, convinced employee truck drivers to pay an eleven percent "service charge" to the company, so that the company could meet its obligations under the collective bargaining agreement. The defendants convinced the drivers in individual meetings after the proposal was overwhelmingly rejected at a general meeting between management and employees. *Id.* at 212. Defendants were charged, tried, and convicted of violating the Hobbs Act and conspiring to violate the Hobbs Act. *Id.* at 209. On appeal, the defendants argued, *inter alia,* that *Enmons* required the district court to dismiss the charges because their goal was "to increase the employer share of the profits from the operation of the Company," and that goal was not wrongful. *Id.* at 215. The Sixth Circuit rejected their argument because the company for which the defendants acted did not have a legitimate claim to the eleven percent "service charge." The company did not

have a legitimate claim to the additional charge because the collective bargaining agreement expressly prohibited the company from deducting welfare and pension benefits from the drivers' earnings. *Id.* at 215. The Sixth Circuit reached the same conclusion in a case brought by a co-defendant of *Russo,* but who had been tried separately and brought a separate appeal. *See United States v. Cusmano,* 729 F.2d 380 (6th Cir.1984).

Those cases are distinguishable, however, because the employer made its demands on individual employees to pay extra fees to the employer, to which the employer was not entitled under the existing contract and which the membership collectively rejected. Here, Defendants' alleged demands were made in the course of negotiating the new local collective bargaining agreement which, if the parties reached an agreement, could have provided for the two positions, and thus the positions would not have been in violation of at least one of the governing contracts. Whether or not the inclusion of that provision in the new agreement between Pontiac Truck and Local 594 would have violated other contractual provisions between the UAW and General Motors should not be the basis of a criminal charge of extortion – that is an issue to be resolved between the UAW, Local 594, General Motors and Pontiac Truck through the established labor relations' dispute framework.

Therefore, the indictment does not allege that Defendants' demands were for illegitimate objectives

and Count Two of the indictment fails to allege an offense against the United States.

C. Count Three

Count Three of the indictment charges Defendants with mail fraud in violation of 18 U.S.C. §§ 1341, 1346 and 2 [sic]. Specifically, paragraph six charges Defendants with defrauding members of Local 594 of

(a) property consisting of the contractual right to obtain the skilled trades and/or journeyman designation;

(b) property consisting of the skilled trades and/or journeyman designation and employment for two undetermined General Motors employees who were either qualified or could become qualified for such designation and employment including the associated wages and benefits; and

(c) the honest services of the Defendants, which they owed to Local 594 members.

Defendants contend that neither the property allegations nor the honest services allegation are sufficient to support an indictment for mail fraud.

1. The Property

Defendants argue that the possibility of employment, or even actual employment which is subject to termination without cause by General Motors, is not "property" under the mail fraud statute.

Defendants rely on *Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), where the Court held that unissued government licenses are not property. Similarly, Defendants rely on *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) for the rule that at-will employment is not a property right. The National Agreement provides that employees are "temporary" during their first ninety days of employment. During their first thirty days, employees may be terminated for any cause without the right to grieve. For the remaining sixty days, the employee may file a grievance only if his layoff or discharge is not for cause.

The government responds with two arguments: the collective bargaining agreements created a contractual right in the members of Local 594 for the skilled trades jobs, and the Local 594 members they intend to produce at trial, from whom the government alleges the jobs were taken, were already employees of General Motors for a sufficient time so that they would not have been temporary employees.

Other circuit courts have held that wages and other financial benefits guaranteed by collective bargaining agreements are sufficient to constitute property for a mail fraud conviction. *See United States v. Palumbo Bros., Inc.,* 145 F.3d 850, 873 n. 3 (7th Cir.1998); *United States v. Boffa,* 688 F.2d 919, 930 (3rd Cir.1982). In this case, however, the bargaining agreements, at most, guaranteed the membership the right to compete for skilled trades positions before any outside hires were considered for the positions.

The government is stretching too far – scheming to deny membership the right to compete for a job does not reach the level of scheming to deny membership wages which were promised in the agreements. The right to compete for a job does not constitute "property." Therefore, this part of Count Three is dismissed.

2. Honest Services

In addition to the "property" alleged above, Count Three also indicts Defendants for intending to defraud the members of Local 594 of "[t]he honest services of defendants owed to Local 594 members pursuant to Article 19, of the UAW Constitution, Section 501(a) of the LMRDA, and the defendants' duty to faithfully and fairly represent the members of Local 594 as labor representatives." The mail fraud scheme is alleged to be in violation of 18 U.S.C. § 1346, which explicitly includes "a scheme or artifice to deprive another of the intangible right of honest services." Congress passed § 1346 in response to the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), in which the Court held that the mail fraud statute did not include schemes to defraud others of honest services. *See United States v. Frost,* 125 F.3d 346, 364 (6th Cir.1997).

The Sixth Circuit has established the following contours of a fraud conviction based on the honest services doctrine:

> Unlike a defendant accused of scheming to defraud another of money or property, a defendant accused of scheming to deprive another of honest services does not have to intend to inflict an economic harm upon the victim. Rather, the prosecution must prove only that the defendant intended to breach his fiduciary duty, and reasonably should have foreseen that the breach would create an identifiable economic risk to the victim.

Frost, 125 F.3d at 369. The *Frost* court also decided that the honest services doctrine may be applied against not only public officials but actors in the private sphere so long as a fiduciary duty exists. *Id.* at 366. Moreover, "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict." *Id.* at 368. Accordingly, in order to be convicted under the honest services doctrine, (1) Defendants must have had a fiduciary duty to the membership of Local 594, (2) they must have intended to breach their fiduciary duty, and (3) they should have reasonably foreseen that the breach would create an economic risk to the membership of Local 594.

Paragraph 6(c) of Count Three alleges three separate sources of Defendants' fiduciary duty to members of Local 594: (1) the UAW Constitution; (2) Section 501(a) of the LMRDA, which prescribes five separate duties upon union officials and employees; and (3) the duty of fair representation incumbent upon all union officials. As to the UAW Constitution, the indictment cites two sections as sources for

Defendants' fiduciary duty: Article 19, Section 1, which prohibits UAW representatives from causing, participating in, or ratifying actions constituting breaches of labor agreements; and Article 19, Section 3, which requires UAW representatives to submit proposed contracts with the employer to the membership of the local union for ratification. Breach of the UAW Constitution may provide the basis for an honest services fraud conviction, *United States v. DeFries,* 129 F.3d 1293, 1304-05 (D.C.Cir.1997), and a union representative may violate their duty of fair representation by submitting a contract for ratification vote without providing the membership with relevant information, *Brown v. IBEW Local No. 58,* 936 F.2d 251 (6th Cir.1991). Therefore, it seems that the UAW Constitution may create a fiduciary duty in Defendants.

Regarding § 501(a) of the LMRDA, the Sixth Circuit has found that it may impose a general fiduciary duty on union officials. *Corea v. Welo,* 937 F.2d 1132, 1144 (6th Cir.1991). *See also DeFries,* 129 F.3d at 1304-05. Section 501(a) provides: "The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group." In *Boffa,* the Third Circuit decided that § 501(a) established "union members' right to the honest and faithful services of union officials." 688 F.2d at 931. Furthermore, even if that is the sole source of such a right, "a scheme to defraud employees of the loyal, faithful, and honest services of their

union official alleges a crime within the scope of the mail fraud statute." *Id.* In sum, the UAW Constitution and 29 U.S.C. § 501(a) establish Defendants' fiduciary duty to local 594 members, and a scheme to defraud union members of the honest and faithful services of their union representatives is sufficient to sustain a mail fraud conviction.

Though the indictment is sufficient to establish Defendants' fiduciary duty to the local membership, it is insufficient to establish the third element of a breach of honest services allegation, that is Defendants should have reasonably foreseen that the breach would create an economic risk to the membership of Local 594. The indictment alleges that Defendants deprived the local membership of their honest services by submitting a misleading contract for the membership's ratification and by withdrawing all grievances filed by local members regarding the hiring of Campbell and Fante. The indictment does not allege that a misleading contract, or withdrawn grievances, put the local membership at economic risk or that Defendants should have reasonably foreseen that it would have. Moreover, these allegations are essentially allegations of unfair labor practices, which should not result in criminal liability. *See Boffa,* 688 F.2d at 928 ("To permit mail fraud prosecutions grounded on unfair labor practices would be to impose criminal penalties for conduct that, until now, has been remediable solely under the NLRA").

In addition to depriving the local membership of their honest services, Count Three also accuses

Defendants of violating their duty to faithfully and fairly represent the members of Local 594. This Court is unaware of any criminal conviction based on a defendant's violation of his duty to faithfully and fairly represent local membership, and the Court declines to create such a basis for an indictment here.

In sum, this indictment attempts to criminalize behavior that is the subject of extensive civil legislation and which has not previously been construed as criminal. Therefore, the Court finds that the indictment fails to sufficiently allege criminal behavior.

III. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

Defendants' motion to dismiss the indictment for failure to state a claim is GRANTED; and the indictment against Jay Campbell and Donny Douglas is hereby DISMISSED.